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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1972

No. 72-956

Supreme Court, U. S.
FILED
Dec 14 1972
MICHAEL RODAK, JR., CLERK

Edward Harris,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Edward Harris, pro se
14335 Burbank Blvd.
Van Nuys, Calif. 91401

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CITATIONS

T.C. MEMO's

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In the Supreme Court of the United States

October Term 1972

No. _____

Edward Harris,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner Edward Harris, hereby petitions that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Ninth Circuit in the above entitled case entered August 3, 1972, affirming the decision of the United States Tax Court.

OPINIONS BELOW

The findings of fact and opinion of the United States Tax Court are unofficially reported at 29 T.C.M. 1510. A motion for rehearing was denied on December 28, 1970. The decision was entered on March 22, 1971.

The decision and opinion of the United States Court of Appeals for the Ninth Circuit is not officially reported. A motion for rehearing was denied on September 15, 1972.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The petitioner was prevented from having a fair trial because of a bias and prejudice Tax Court. This was exhibited in three ways:

1. The Tax Court failed to follow it's own rules of practice.

2. The refusal of the Tax Court to accept material and relevant evidence.

3. The petitioner alleges that a great portion of the findings of fact and opinion in T.C. Memo. 1970-331 is not based on the record, evidence or testimony, not even based on supposition and conjecture but is based on the ability of the Tax Court to fabricate and manufacture untruths and lies.

The petitioner also questions the propriety of the Commissioner's actions in this case.

1. The withholding and suppression of evidence detrimental to his case.

2. In the preparation of the Stipulation of Facts, the Commissioner switched and substituted figures different than those agreed upon in the stipulation conference.

3. The Commissioner is using the provisions of the Internal Revenue Code as amended by Revenue Acts and other Public Laws in an inconsistent, contrary and contradictory manner. The results of the audit and examination of the petitioner's records for the calendar year 1963 indicates he approved the petitioner's entitlement to the Hazeltine building deductions.

4. The use of SURPRISE at the Tax Court trial. The Commissioner raised issues and grounds not stated in the notice of deficiency or the answer.

Therefore, the basic concepts of justice are at issue in this case.

STATUTES AND REGULATIONS INVOLVED

Rule 14(b), of the Rules of Practice of the United States Tax Court states, "that the answer shall be drawn so that it will advise the petitioner and the Court FULLY of the nature of the defense."

STATEMENT OF THE CASE

The sole reason that this case is before this Court is that the petitioner's individual rights are being trampled by judicial and administrative actions.

The original deficiencies were proposed in the Commissioner's letter dated March 11, 1968 totaled $5,674.23 for the calendar years 1964, 1965 and 1966. The explanation of adjustments stated net loss from rentals and investment loss were disallowed for lack of substantiation.

The petitioner was involved in the construction, operation and subsequent foreclosure of apartment buildings in the Los Angeles, California area.

On August 28, 1968 the petitioner presented to the IRS Appellate Conferee and a representative of the Regional Counsel a total of 294 cancelled checks and 107 other documents.

The Stipulation of Facts, pages 27-34 of the official record show that the pepitioner substantiated by 100% or greater the disallowed items as shown in his original tax return.

After the trial started in Los Angeles,

California on January 26, 1970, the Commissioner raised three new and false issues which WERE NOT stated in the notice of deficiency or the answer. These issues are as follows:

1. Interest income for the calendar year 1963. A year not at issue in this case.

2. Entitlement to deductions on the Hazeltine property.

3. Entitlement to depreciation on the Burbank property.

Judge Drennen in the Mississippi Steel Case, T.C. Memo. 1971-18 states "It is axiomatic that issues must be raised by written pleadings, and unless so pleaded, will not be considered."

The Commissioner has SURPRISED the taxpayer at the hearing by presenting grounds different from those in the deficiency notice.

It should be pointed out that the Commissioner presented no acceptable evidence to support his contention.

The Commissioner with evil intent and malice LIED to the Tax Court when he stated the petitioner's records were not examined for the calendar year 1963.

The Commissioner is unable to correct-

ly compute the tax liability for the years at issue before the Court. His computation in the notice of deficiency is 875% greater than his computation under the Tax Court rule 50 issue.

The petitioner presented eleven issues for review to the United States Court of Appeals for the Ninth Circuit. In that Courts opinion as shown on page 19, it comments on only one issue and DUCKS THE OTHER ISSUES the petitioner presented for review.

The United States Court of Appeals for the Ninth Circuit failed to notify the petitioner of the time and place of it's hearing.

The decision of the Tax Court to allow the Commissioner to present issues and grounds not stated in the notice of deficiency or thr answer is in conflict with other Tax Court and United States Court of Appeals decisions.

REASONS FOR GRANTING THE WRIT

The petitioner was prevented from having a fair trial because of a bias and prejudice Tax Court.

1. The Tax Court failed to provide the petitioner an opportunity to receive a copy of the transcript of proceedings at the calendar call on January 26, 1970. Begining on line 23 of page 39 of the official record, the Commissioner states: "The stipulation Mr. Harris referred to, in effect, stipulates the Government out of Court." The Stipulation of Facts that the Commissioner did sign, as shown on pages 27-34 of the official record, should stipulate the Government out of Court. This is proof beyond a reasonable doubt that the Commissioner does not have a case against the petitioner.

2. The petitioner alleges that his trial was not conducted in accordance with the rules of practice of the United States Tax Court. The petitioner specifically complains about the violations of the following rules of practice:

a. Rule 14(b).

This rule states "that the answer shall be drawn so that it will advise the pet-

itioner and the Court fully of the nature of the defense." The answer as shown on pages 9 and 10 of the official record, does not advise the petitioner and the Court fully of the nature of the defense that the Commissioner presented at the trial.

b. Rule 17(c)(1).

The MOTION FOR AMENDMENT TO ANSWER, as shown on page 23 of the official record pointed out the defects complained of and the details desired.

c. Rule 31(b)(6).

The Court may set aside a stipulation in whole or in part where justice requires, but otherwise will not receive evidence tending to qualify, change or contradict any fact properly introduced into the record by stipulation. A portion of paragraph 15 of the Stipulation of Facts as shown on page 31 of the official shows a deduction of $4,050.00 for depreciation for the Burbank property for the calendar years 1965 and 1966. The Commissioner did not introduce any evidence to permit the Tax Court to qualify, change or contradict any fact properly introduced into the record by stipulation. The issue

of depreciation deductions on the Burbank building were not shown on the notice of deficiency or the answer and therefore must not be an issue at this time. The petitioner refers the Court to T.C. Memo. 1971-18 which states "It is axiomatic that issues must be raised by written pleadings, and, unless so pleaded, will not be considered." The Tax Court has arbitrarily, erroneously and irrationally as shown on page 64 of the official record, allowed the petitioner only one-half of the depreciation of $4,050.00 as shown in the Stipulation of Facts.

d. Rule 32.

The burden of proof, on issues not pleaded, must be on the Commissioner. The Stipulation of Facts, pages 27-34 of the official record, proves that the petitioner has substaniated over 100% of the disallowed rental and investment loss, as stated in the notice of deficiency and the answer. The Commissioner by raising new and false issues has made allegations concerning matters on which the burden of proof is placed upon him by statute. Sam Cook 25 BTA 92 (1932).

e. Rule 50.

The petitioner is entitled to pay the lowest tax for the years at issue before the Court, according to the provisions of the Internal Revenue Code as amended by Revenue Acts and other Public Laws. The Tax Court is derelict in it's duty by accepting the respondent's computation in the Tax Court rule 50 issue. The use of form 1040G, the income averaging form would of reduced the stated tax by approximately fifty percent. Futhermore, the Commissioner omitted many allowable deductions. The Tax Court has stated on page 69 of the official record that the notice of deficiency is in error. Therefore, it is not incumbent on the taxpayer to show that he owes no tax or to show what amount of tax he does owe.

3. The petitioner complains and alleges that the Commissioner has infringed, deprived and denied the petitioner a portion of his constitutional rights.

a. The petitioner was informed of new accussations after his trial began.

b. The Commissioner's use of SURPRISE prevented the petitioner from being represented and assissted by counsel in

his defense.

c. The Commissioner's use of SURPRISE prevented the petitioner from having witnesses to testify in his behalf.

4. The petitioner objects to new and false issues raised after his trial began. These new and false issues are as follows:

a. Interest income for the calendar year 1963.

b. Entitlement to Hazeltine building deductions.

c. Entitlement to Burbank building depreciation.

The petitioner refers the Court to T.C. Memo. 1971-18 which states "It is axiomatic that issues must be raised by written pleadings, and, unless so pleaded, will not be considered." The Commissioner should allege in his answer any additional deficiency and then state the specific grounds which form the basis of such deficiency.

Nor may the Commissioner surprise the taxpayer at the hearing by presenting grounds different from those in the deficiency notice. The petitioner cites the following cases: Hormel v. Helvering, 312,U.S. 552, 61 S. Ct. 154, 85 L. Ed. 1037 (1939); Helvering v. Tex-Penn Oil Co., 300 U.S. 481. 57 S.

Ct. 569, 81 L. Ed. 755 (1937); Comm. v. Chelsea Products, Inc., 197 F.2d. 620 (3d Cir. 1952); Moore v. Comm., 202 F. 2d 45 (5th Cir. 1953); Anderson v. Comm., 156 F. 2d 591 (2d Cir. 1946); W.E. Weaver, 32 T.C. No. 40 (1939); Meyer Katz, 46 B.T.A. 187, aff'd, 139 F.2d 107 (7th Cir. 1943).

5. The Commissioner suppressed evidence detrimental to his case. The suppressed document is the American Savings and Loan Association 1963 Loan history statement regarding the Hazeltine building. A copy of this document is shown as page 23 of the Appellant's opening brief.

6. The refusal of the Tax Court to accept material and relevant evidence. This evidence is listed as Exhibit 23 of the official records, a copy of cashier's check #945095 in the amount of $1,051.00 which represents the January 1965 payment on the Hazeltine building.

7. The petitioner's repudiation of portions of paragraph 15 of the Stipulation of Facts. In the stipulation conference, the petitioner submitted documentation in support of the full amounts of interest, property taxes and "repairs and other ex-

penses" as shown in Exhibits 12 and 13. Paragraph 15 in the Stipulation of Facts, as shown on page 31 of the official record, show that the Commissioner in the preparation of this manuscript switched and substituted figures of the petitioner's original returns. Pages 26-33 of the Appellant's opening brief show the documentation submitted to the Commissioner.

8. The arbitrarily, erroneously and irrationally findings of fact and opinion by the Tax Court. On pages 36-39 of the Appellant'a opening brief are cited numerous instances where the Tax Court has fabricated and manufactured untruths and lies from the available record, evidence and testimony.

9. Tax Court Exhibit 15 is the results of the audit and examination of the petitioner's records for the calendar year 1963. The Commissioner has approved entitlement to the Hazeltine deductions in this audit. The Commissioner is now using the provisions of the Internal Revenue Code as amended by Revenue Acts and other Public Laws in an inconsistent, contrary and contradictory manner.

CONCLUSION

For the reasons stated, Petitioner respectivelly submits, that the petition for certiorari be granted.

Respectivelly submitted,

Edward Harris

Edward Harris, pro se

October 10, 1972

APPENDIX

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT , CLERK

RD HARRIS,

Petitioner and Appellant,

vs.

MISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

No. 71-1904

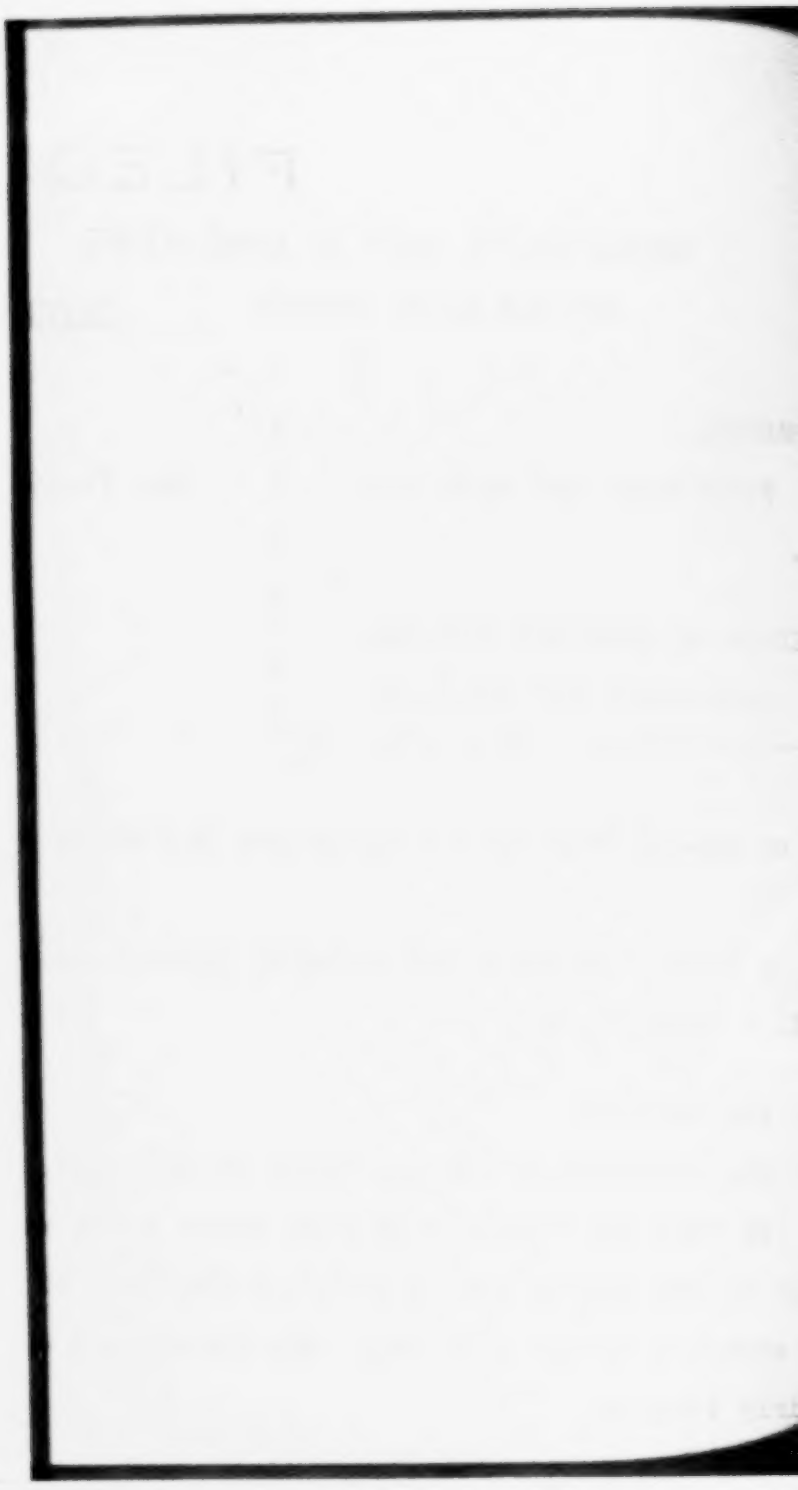
On Appeal from the United States Tax Court

Before: CHAMBERS and KOELSCH, Circuit Judges, HILL, District Judge.

Per curiam:

The decision of the tax court is affirmed.

We find the findings of that court to be well ported in the record and do not find the lack of du cess asserted by the taxpayer. The petitioner was y fairly treated.



argument, contends that respondent has completely failed to raise any issue other than that petitioner was not entitled to file a consolidated return with Flowood, and since respondent conceded that issue in his original brief, there remains no issue for us to decide. While respondent did not address himself to this question on brief, he did contend in oral argument on July 29, 1970, that the notice of deficiency was broad enough to cover the built-in loss issue and that therefore that issue is properly before the Court.

It is axiomatic that issues must be raised by written pleadings and, unless so pleaded, will not be considered. Samuel E. Hirsch, 16 TC 1275, 1279 (1951). We must therefore look solely to the written pleadings filed in this case to determine if the built-in loss issue under section 1.1502-31A(b)(9), Income Tax Regs., has been properly raised so that it can be considered in our redetermination of the deficiencies herein.

An issue has been defined as "a single, certain and material point, arising out of the allegations or pleadings of the parties, and generally, should be made up by an affirmative and negative." Simonton v. Winter, 30 U.S. 141, 148. Upon close perusal of the notice of deficiency,[1] petition, and answer, we are convinced that the only issue raised by the pleadings is whether petitioner is entitled to file a consolidated return with Flowood. We find no inkling whatsoever of an issue dealing with the disallowance of the losses on the sale of the Pinola and Texas farms under section 1.1502-31A(b)(9).

Respondent maintains that the phrase "and the claimed deduction of $227,251.44 resulting from the sale of assets of that corporation is not allowable" contained in the notice of deficiency places at issue his determination that the claimed losses of $227,251.44 are not allowable. He further maintains that the statement in the notice of deficiency that petitioner was not entitled to file a consolidated return with Flowood because there was no business purpose for the acquisition by petitioner of Flowood is simply one reason stated in the notice of deficiency for his determination that the losses were not allowable. In this regard, he points to the well-established principle in this Court that the reasons given in the notice of deficiency do not constitute the issue and the presumption of correctness which attaches to respondent's determination is not destroyed if the reasons are unsound or badly expressed. Max Schuster, 50 T.C. 98 (1968); Wilkes-Barre Carriage Co., 39 T.C. 839 (1963); Estate of Peter Finder, 37 T.C. 411 (1961); Standard Oil Co., 43 B.T.A. 973, affd. 129 F.2d 363 [29 AFTR 891] (C.A. 7, 1942); James P. Gossett, 22 B.T.A. 1279, 1284, affd. 59 F.2d 365 [11 AFTR 510] (C.A. 4, 1932); Edgar M. Carnrick, 21 B.T.A. 12.

We disagree with respondent, however, that the notice of deficiency is framed to raise the issue of the deductibility of the losses under section 1.1502-31A(b)(9), Income Tax Regs. In our opinion the "single, certain and material point" arising out of the notice of deficiency is the right of petitioner to file a consolidated return with Flowood. Even if we read the two clauses in the explanatory sentences in the disjunctive rather than the conjunctive, as respondent suggests we do, neither clause read separately would suggest any issue other than the right of petitioner to file a consolidated return with Flowood. While we recognize that respondent is not always limited to the reasons given in the statutory notice for disallowance of a deduction, we do think that if he is relying on an issue not raised by the statutory notice or on a reason diametrically opposite to the reason given in the statutory notice, or at least substantially different from that reason, which would require proof of entirely different

[1] In Federal income tax cases filed in this Court, the notice of deficiency is the foundation for issues; yet prior to the filing of a petition the notice of deficiency is not a part of the pleadings or record in a Tax Court case. The petition thus becomes the original pleading in a Tax Court case. Rule 7, Tax Court Rules of Practice. While there has been some uncertainty about whether the notice of deficiency is a part of the pleadings or record in a Tax Court case, without the notice of deficiency it would be impossible for this Court to redetermine the correctness of the deficiencies determined by the Commissioner. Hence, it is clear that when a copy of the notice of deficiency is attached to the petition, as required by Rule 7(c)(4)(E) of the Tax Court Rules, either when originally filed or by direction of the Court pursuant to the aforementioned rule, the notice of deficiency and any statement attached thereto becomes a part of the pleadings and/or record in a Tax Court case. Here, the notice of deficiency with a statement attached was appended to the petition and is therefore a part of the pleadings in this case.

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CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ND HARRIS,

Appellant,

vs.

No. 71-1904

ISSIONER OF
NAL REVENUE,

Appellee.

ORDER

re: CHAMBERS and KOELSCH, Circuit Judges, and MILL
District Judge.

The motion for rehearing is denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-956

EDWARD HARRIS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner took deductions on his income tax returns for 1964, 1965 and 1966 for operating losses and loss carryovers arising from his real estate and apartment construction activities. The Commissioner disallowed the deductions claimed for lack of substantiation and issued a tax deficiency notice, a redetermination of which was sought by petitioner in the Tax Court. (A. 5.)[1] Petitioner increased the amount of his claims repeatedly throughout the Tax Court proceeding, and also requested tax refunds

[1] References are to the appendix to this memorandum.

494-351—73——1

for 1961, 1962 and 1963, years for which no deficiency notice had issued. The Tax Court held that it was without jurisdiction to consider 1961, 1962 and 1963 absent a deficiency notice. (A. 6–7.) As to the claims for 1964, 1965 and 1966, the court, following extensive consideration of petitioner's evidence, permitted the claimed deductions to the extent petitioner was able to substantiate them. The court rejected petitioner's claims with respect to those amounts not substantiated and entered a decision from which petitioner appealed. (A. 17–20.) The court of appeals, concluding that the Tax Court decision was supported by the evidence and that there was no denial of due process, affirmed *per curiam*. (Pet. App. 19.)

Petitioner's main contention relates to the failure of the Commissioner to stipulate with petitioner concerning the correctness of his claims. (Pet. 10–12.) The record shows, however, that the Commissioner did agree to a number of deductions with respect to which petitioner supplied some substantiation during the Tax Court proceeding. The Commissioner is not required to agree to deductions that are not substantiated, and it is the taxpayer's burden to prove his deductions. Petitioner failed to sustain that burden and cannot complain of the Commissioner's or the Tax Court's failure to accept deductions not supported by evidence.

Petitioner also asserts (Pet. 10) that he did not receive a transcript of the Tax Court proceeding, but does not indicate that he made efforts to obtain one.[2]

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[2] Nor is there a claim that petitioner is indigent.

Moreover, although he complains of the lack of a transcript, his briefs below make repeated references to the transcript, indicating that a transcript was available to him. Petitioner also alludes (Pet. 15) to the Commissioner's failure to submit evidence which petitioner could have introduced himself had he chosen to do so. Finally, he asserts that "the Tax Court has fabricated and manufactured untruths and lies" (Pet. 4, 16). These and other assertions were properly rejected by the court of appeals and do not merit further review by this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

APPENDIX

¶ 70,331—TC Memo 1970-331

EDWARD HARRIS. Docket No. 2207-68. 11-25-70. Opinion by SCOTT, J. Years 1964-1966, Deficiencies redetermined.

Losses—Net operating loss deduction—computation of carryback or carryover—intervening years. Net operating loss carryback allowed joint owner of several properties for losses incurred in operation and demolition. Court determined amounts for expenses and depreciation in computation of carryback. *Reference:* 1970 P-H Fed. ¶ 14,612.

Official Report

Edward Harris, pro se.
Robert H. Feldman, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

SCOTT, *Judge:* Respondent determined deficiencies in petitioner's income tax for the calendar years 1964, 1965, and 1966 in the amounts of $2,306.96, $1,370.28, and $1,996.99, respectively.

At the trial petitioner filed an amendment to petition in which he alleged that he is entitled to refunds for the years 1961, 1962, and 1963 in the amounts of $1,552.92, $1,859.02, and $276.21, respectively because of net operating loss carrybacks.

Respondent on March 6, 1970, filed a Motion to Dismiss for Lack of Jurisdiction and to Strike as to the Taxable Years 1961, 1962 and 1963 on the ground that no deficiency notice had been mailed to petitioner with respect to these years and that they were involved in this case only insofar as it might be necessary to determine petitioner's income for those years to find what amount, if any, of net operating loss petitioner would be entitled to carry over from the years 1964 or 1965 to the year 1966.

On March 16, 1970, an order was entered that the parties present arguments in their briefs with respect to respondent's motion. Petitioner in his brief did not contend that he had been issued a notice of deficiency for any of the years 1961, 1962, and 1963, but contended that this Court should have jurisdiction to grant refunds for those years since he had previously filed claims for refunds for each of the years involved.

It is well settled that this Court has jurisdiction to determine a deficiency in or overpayment of tax by a taxpayer only for those years with respect to which a notice of deficiency has been mailed by the Commissioner to such taxpayer and that the jurisdiction of this Court over other years is limited to consideration of such facts as may be necessary to correctly redetermine the taxpayer's tax liability for a year with respect to which a deficiency notice has been mailed to the petitioner. Sections 6212, 6213, and 6214, I.R.C. 1954.[1] We, therefore, sustain respondent's motion and will enter an appropriate order dismissing petitioner's petition insofar as it attempts to place in issue the years 1961, 1962, and 1963. However, we will consider the evidence in the record with respect to those years to the extent necessary to permit a determination of whether there is a net operating loss carryover from

[1] All references are to the Internal Revenue Code of 1954.

either 1964 or 1965 to the year 1966 and, if so, the amount of such loss carryover.

Having disposed of the jurisdictional question, the remaining issues for decision are (1) the proper amount of deductions to which petitioner is entitled in the years 1964 and 1965 for operating losses on two rental properties which he owned jointly with either his brother or his brother's wife, (2) the amount of petitioner's loss on foreclosure in 1965 of the mortgage on one of these properties, (3) the amount of the operating profit or loss with respect to the other such property in 1966, (4) whether petitioner is entitled to a demolition loss with respect to another property in 1964 and if so the amount thereof, and (5) how should the net operating losses, if any were sustained by petitioner in the years 1964 and 1965, be applied in determining whether petitioner is entitled to an operating loss carryover to the year 1966.

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly.

Petitioner, an individual who resided in Van Nuys, California, at the time of the filing of the petition in this case, filed his individual Federal income tax returns for the calendar years 1964, 1965, and 1966 with the district director of internal revenue at Los Angeles, California.

Sometime prior to the year 1963 petitioner and his brother, Lawrence Harris (hereinafter referred to as Lawrence) entered into an oral agreement with respect to the purchase of certain properties, the construction of buildings thereon, and the sale of those buildings. Lawrence was an architectural engineer. He and petitioner agreed that petitioner would furnish the "front" money to build certain buildings and

Lawrence would do the architectural and contractor work. The buildings were to be apartment buildings. Petitioner and Lawrence planned to rent the apartments in each building as soon as the construction of that building was completed and immediately after the various apartments had been rented, sell the building. They agreed that for the services which each was to render he would receive 50 percent of the expected profit.

In accordance with their agreement, petitioner and Lawrence in 1962 purchased property at 6922 Hazeltine Avenue, in Van Nuys, California (hereinafter referred to as the Hazeltine property), and in 1963 constructed thereon a 16-unit apartment house. The title to this property was at sometime during 1963 placed in the names of petitioner and Sylvia Harris, the wife of Lawrence. The parties, however, understood that Sylvia held title to the property on behalf of Lawrence.

During 1963 or 1964 petitioner and Lawrence acquired property at 14335 Burbank Boulevard in Van Nuys, California (hereinafter referred to as the Burbank property), and built a 20-unit apartment building thereon in 1964.

In 1963 either petitioner or Lawrence or the two of them or petitioner jointly with Sylvia acquired a piece of property in Canoga Park, California at a cost of $25,000. The settlement statement for the closing of the purchase of this property was made in the name of Lawrence. There was on this property at the time it was acquired a house which was being rented at $85 per month. During the year 1964 rents from the apartments on the Hazeltine property were received in the amounts of $13,720. The amounts so received were used to pay various expenses in connection with the operation of the Hazeltine property.

On a straight line basis which was the basis used by petitioner on his tax return for the years 1964 and 1965, depreciation on the Hazeltine property was $6,150 for the year 1964 and $4,462.50 for the period from January 1, 1965, until the time the mortgage on the Hazeltine property was foreclosed in 1965. For the year 1964 repair costs on the Hazeltine property were $401.64 and other operating expenses were $17,461.12. These operating expenses did not include any amount for telephone, transportation, or office expenses. For 1965 operating expenses on the Hazeltine property of $9,868.36 were sustained without taking into consideration a $213 note payment which respondent on brief conceded was properly a part of operating expenses. The $9,868.36 operating expenses did not include any amount for transportation, telephone, and office expenses incurred in connection with the rental operation.

In the year 1964, and for part of the year 1965, petitioner lived in the Hazeltine property and for the remainder of 1965 lived in the Burbank property. The Hazeltine and Burbank properties are about 3 miles apart.

During the year 1965 rents were received from the apartments on the Hazeltine property in the amount of $2,900.

Petitioner had a telephone in his apartment in either the Hazeltine or Burbank property which he used for his personal use and also used for necessary calls with respect to rental of apartments. Petitioner during the years 1964 and 1965 owned a Chevrolet automobile which he used when necessary to drive between the Hazeltine and Burbank properties in connection with the rental operation or to pick up a prospective tenant and take him to see an apartment in one or the other of the properties. Petitioner also at times wrote letters

in connection with the rental operations of the Hazeltine property on stationery he purchased for that purpose and purchased stamps for mailing those letters. In addition to the other operating expenses of the Hazeltine property there were telephone expenses of $60 in each of the years 1964 and 1965, transportation expenses of $200 in each of these years, and office expenses of $60 in each of these years.

The construction of an apartment house on the Hazeltine property in 1963 was financed primarily by a loan from the American Savings and Loan Association which was granted in the name of Edward Harris and Sylvia Harris and from a second mortgage loan on the property. However, there were payments in the total amount of $19,777.36 in connection with the construction of the apartment building which were made from funds other than the proceeds from the construction loan and second mortgage loan. The disbursements which totaled the $19,777.36 were made by Lawrence, the general contractor on the project. Also, a downpayment in the amount of $10,840 was made on the property not from loan proceeds into an escrow account. In 1963 and 1964 the amounts of $1,021.30 and $2,510.84, respectively, were made as a reduction in principal on the American Savings and Loan Association mortgage. In late 1962 a deposit in the amount of $700 was made with the American Savings and Loan Association in connection with obtaining the construction loan. The second mortgage loan obtained by petitioner and Lawrence was from Bobby G. and Betty Jeanne Spicer. The funds obtained from this loan were used in construction of the apartment on the Hazeltine property. During 1962 $724 of the principal of this second mortgage was repaid and during 1963 $1,158.05 of the principal of this loan was repaid.

In 1964 payments on the Spicer note were in arrears and the Spicers filed a notice of default and election to sell under deed of trust. In order to obtain the filing by the Spicers of a rescission of this notice of default and election to sell under deed of trust, petitioner and his brother Lawrence, on April 15, 1964, paid $3,551.98 to the trustee under the deed of trust, Woodnard, Inc. The rescission of the notice recited that the beneficiaries (the Spicers) had heretofore delivered to the trustee a declaration of default and demand for sale and that they now gave notice that they hereby rescinded, cancelled, and withdrew the declaration of default. The receipt for the payment of $3,551.98 carried the legend "Received from Mr. Lawrence Harris" the amount of $3,551.98. Above the name "Lawrence" on the receipt was written the name "Edward." In addition to the principal payment of $724 on the Spicer note in 1962 there was an interest payment of $980 on that note.

For the years 1965 and 1966 there was depreciation sustained and operating expenses incurred by petitioner and Lawrence in connection with the rental of apartments on the Burbank property in the following amounts:

	1965	*1966*
Depreciation	$4,050.00	$4,050.00
Interest	16,456.72	10,468.54
Property taxes	3,625.66	2,285.48
Other expenses	9,589.20	6,251.77
Total	29,671.58	19,005.79

Included in other expenses for each of the years 1965 and 1966 are $250 for transportation expense, $150 for telephone expense and $60 for office expenses.

In late 1963 petitioner and Lawrence borrowed $180,000 from parties by the name of Moore. These

funds were used in construction of the apartment building on the Burbank property and the loan was secured by a second deed of trust on the Burbank property. In 1964 petitioner and Lawrence paid $9,900 of interest in connection with this $180,000 loan on the Burbank property, no portion of which was claimed to be deductible by petitioner on his 1964 income tax return.

After the purchase of the Canoga Park, California property in 1963, petitioner or his brother attempted to collect the rent each month from the tenant who was living in the house on the property. The rent would not be timely paid but the tenant would make promises to pay the next week or the next month. After some length of time the tenant left the house and when petitioner and Lawrence inspected the house after the tenant had left they found broken windows, plumbing removed, doors gone, and the house in an unlivable condition. Thereafter they received notices from the Fire Department with respect to the lack of safety of the house and finally received a citation sometime late in 1964, requiring them to either repair or demolish the house since the house in its present conditions constituted a fire hazard. After this citation had been received, the house was demolished at a total cost of $1,383.

As of September 6, 1962, petitioner had $35,729 in 23 separate savings accounts in the Los Angeles area. The funds in these savings accounts had been accumulated by petitioner gradually and the moneys from these accounts were withdrawn at varying times by petitioner to purchase real property.

Petitioner on his original income tax return for the calendar year 1964 claimed a loss on rental of the Hazeltine property of $10,292.76, computed by subtracting from total rents received of $13,720 deprecia-

tion on the straight line basis of $6,150, repairs of $401.64 and other expenses of $17,461.12.

Respondent in his notice of deficiency disallowed the claimed loss of $10,292.76 with the statement that it was disallowed for lack of substantiation.

Petitioner, after receipt of the notice of deficiency which was dated March 11, 1968, filed with respondent an amended income tax return for the year 1964 which he signed under date of April 12, 1968. On this amended return petitioner claimed a loss from the rental of the Hazeltine property of $11,659.43 computed by subtracting from rents received of $13,720, depreciation of $7,516.67, repairs of $401.64, and other expenses of $17,461.12. With this amended return for the year 1964 was filed a claim for refund for the year 1961 which was based on the carryback of the loss shown on the amended 1964 return to the year 1961. In the amended return petitioner claimed also a loss on the demolition of the building on the Canoga Park, California property in the amount of $1,383. On both the original and amended return the basis of the building on the Hazeltine property was shown as $134,000 and the basis of the fixtures as $13,000. The increased depreciation claimed in the amended return resulted from a claim for additional first year depreciation on the amended return which had not been claimed on the original return. At the trial petitioner claimed that the basis of the building should be increased from $134,000 to $146,346 and claimed "bonus depreciation" on fixtures under section 179. At the trial petitioner also claimed that he should be allowed a demolition loss on the Canoga Park property of $21,383 which was based on allocating 80 percent of the $25,000 paid for the property to the building and adding to the resultant $20,000 the $1,383 demolition cost. Petitioner claimed

that he should be entitled to the total loss on this property.

On his income tax return for the calendar year 1965 petitioner claimed a loss of $48,731.77 from the foreclosure on the Hazeltine property. Petitioner did not show the computation of the loss of $48,731.77 claimed on the foreclosure of the Hazeltine property but he did not claim any loss from the operation of this property on the rent schedule on his return, and the parties stipulated that the 1965 operations loss on the Hazeltine property was included in the foreclosure loss of $48,731.77 shown on petitioner's return. Respondent in his notice of deficiency disallowed this claimed loss for lack of substantiation. Petitioner in a reply to respondent's answer claimed that the foreclosure loss on the Hazeltine property which he sustained in 1965 should be $50,689.55 computed as follows:

Downpayments and payments on loan	$19,135.37
Construction costs and construction loan paid by petitioner	19,346.45
1965 operating loss from rentals at 6922 Hazeltine Avenue, Van Nuys, California	11,207.73
Transportation expenses	1,000.00
Total loss claimed on foreclosure	50,689.55

At the trial petitioner claimed that this loss should be increased by an additional amount of $3,551.98 which he paid on the Spicer note to obtain the rescission of the notice of default and election to sell under deed of trust. At the trial petitioner also claimed that depreciation which was included in the claimed loss in the amount of $4,462.50 should be increased by the allowance of an increased basis for the Hazeltine building and "bonus depreciation" under section 179 on fixtures.

Petitioner claimed no deduction with respect to the Burbank property on his return for the calendar year 1964 but at the trial claimed to be entitled to a deduction of $6,000 for interest paid in 1964 with respect to the loan on the Burbank property. On his return for 1965 petitioner claimed a deduction of a loss on operation of the Burbank property of $7,655.29 computed by subtracting from rents received of $11,200 depreciation of $4,050 and repairs and other expenses of $14,805.29. Respondent in his notice of deficiency disallowed the claimed loss from rental of the Burbank property of $7,655.25 for lack of substantiation.

At the trial petitioner claimed that the expenses in connection with the operation of the Burbank property for the year 1965, exclusive of depreciation, were $31,802.76 of which one-half or $15,901.38 was deductible by him.

On his income tax return for the calendar year 1966 petitioner claimed a loss from the operation of the Burbank building of $3,704.79 computed by subtracting from total rents received of $9,818 depreciation of $4,050 and other expenses of $9,472.79. Petitioner also claimed a deduction for "net operating loss carryback (1966)" of $6,283.15.

Respondent in his notice of deficiency disallowed these claimed deductions for lack of substantiation.

On April 15, 1968, petitioner filed a claim for refund of income tax for the year 1962 of $1,709 which he showed to be computed as follows:

Due to net operating loss suffered in 1965 of	$46,576.70
Used in 1966	6,283.15
Carryover	40,293.55
To be applied to 1962	10,330.08
Carryover	29,963.47

Also on April 15, 1968, petitioner filed a claim for refund of income tax for the year 1963 in the amount of $276.21, which he computed by showing an operating loss sustained in 1965 of $46,576.70, with $16,613.23 previously used in 1966 and 1962 with a carryover of $29,963.47 of which $1,646.53 was to be applied to 1963.

Petitioner on his 1962 income tax return reported total income of $10,330.08 which was shown to have been received from wages, and claimed a standard deduction of $1,000, showing his total net income to be $9,330.08. Petitioner reported no income from interest for the year 1962 and claimed no business expense deductions. For the year 1963 petitioner on his Federal income tax return reported wages of $13,328.70 and interest income from North Hollywood Federal of $100.48, making a total income of $13,429.18. From this amount he subtracted itemized deductions of $11,782.65 which consisted of interest expense of $9,835.41 paid in connection with an apartment house to American Savings and Loan Association and the Spicers, taxes of $1,479.69 and other deductions of $467.55, which includes a deduction of $334.55 for "Apt. House Fire Insurance."

Petitioner's 1963 income tax return was the subject of a "U.S. Treasury Department—Internal Revenue Service Report of Individual Income Tax Audit Changes" attached to a form letter addressed to him under date of August 14, 1964, by the district director of internal revenue, in which it was proposed to disallow a deduction he had claimed of $600 for a dependency exemption for his mother, to disallow computation of his tax as head of a household, and to disallow a deduction for "Fire Insurance" of $334.55. The record does not show whether any adjustments were finally made in petitioner's income as reported

for the year 1963 in accordance with these proposed adjustments.

Respondent takes the position that petitioner's 1962 reported income should be increased by at least $1,000 in determining the amount of any net operating loss carryback from 1964 or 1965 which would be absorbed by the income of that year. The $1,000 respondent claims is a minimum amount of interest which petitioner should have reported from the 23 various savings accounts which he had in the greater Los Angeles area.

ULTIMATE FINDINGS OF FACT

1. The Hazeltine property, the Burbank property, and the Canoga Park, California property were owned jointly by petitioner and Lawrence and were operated by petitioner and Lawrence in a joint venture in which each was entitled to share in profits or losses to the extent of 50 percent.

2. In the year 1964 petitioner and Lawrence sustained an operating loss on the Hazeltine property in the amount of $11,301.24 of which petitioner is entitled to deduct one-half or $5,650.62.

3. Petitioner for the calendar year 1964 is entitled to deduct in addition to the interest deductions claimed by him on his income tax return for that year, the amount of $4,950, which represents one-half of the $9,900 interest paid by petitioner and Lawrence with respect to the Burbank property in the year 1964.

4. For the year 1964 petitioner is entitled to deduct $3,691.50 as a demolition loss in connection with the Canoga Park, California property which is computed by taking one-half of $6,000 representing the

part of the purchase price of the property allocable to the building plus one-half of the $1,383 demolition cost.

5. For the calendar year 1965 petitioner is entitled to deduct a loss of $5,660.79 from operation of the Burbank property. Depreciation and expenses on the Burbank property which are deductible by petitioner and total $16,860.79 are computed by taking one-half of the depreciation of $4,050 claimed on petitioner's income tax return for that year and one-half of the $29,671.58 of expenses which we determined in our findings were sustained in connection with that property. From these expenses is deducted the $11,200 of rents shown by petitioner on his return to be his portion of the rents received from this property.

6. For the year 1965 petitioner is entitled to deduct as an operating loss in connection with the Hazeltine property $5,981.93, computed by deducting from total expenses in connection with the operation of the property as set forth in our findings of fact of $10,401.36 plus total depreciation on the property of $4,462.50 (a total of $14,863.86) the total rental received of $2,900 and dividing the resultant loss of $11,963.86 by two. Petitioner is entitled to deduct the amount of $14,835.51 for the year 1965 as a loss on the foreclosure sale on the Hazeltine property, which amount is computed by dividing the computed adjusted basis of the property to petitioner and Lawrence equally between them. On the basis of this record and because of respondent's agreement as to certain items to be included in the computation of basis, we have determined a basis in the property of $29,671.03, composed of the following items:

Downpayment and payments of principal on loan used to construct the property	$16,954.19
Construction costs disbursed by Lawrence from funds other than those received from the construction loans	19,777.36
Payment to Spicers to obtain rescission of order of sale under deed of trust	3,551.98
Total	40,283.53
Less depreciation claimed and allowed on building for the years 1964 and 1965	10,612.50
Total	29,671.03

7. For the year 1966 petitioner is entitled to deduct $1,709.89 as a loss on the operation of the Burbank property which is computed by subtracting from one-half of the total of $19,005.79 of operating expenses as set forth in our findings of fact plus one-half of $4,050 depreciation as set forth in our findings of fact, the rental received from the property as reported by petitioner on his return of $9,818.

8. Petitioner is entitled to a net operating loss carryover from the years 1964 or 1965 to the year 1966 if there remains any such net operating loss after first carrying the 1964 loss to 1961, 1962 and 1963 and first carrying the 1965 loss to 1962 and 1963. In making the computation there should be deducted from any net operating loss resulting from the findings we have set forth for the year 1964, an amount of net operating carryback necessary to absorb the income reported by petitioner for the year 1961 on his Federal income tax return for that year and taking any remaining net operating loss for the year 1964 over to the year 1962 as a carryback to that year. For the year 1962 this loss, if any, is to be deducted from the income of $10,330.08 reported by petitioner from wages for that

year. If there remains some net operating loss from the year 1964, it is to be a carryback to petitioner's year 1963. If there does not remain any such loss carryback then any loss carryback computed to result from a computation for the year 1965 shall be used in the year 1962 to the extent necessary to absorb the remaining portion of the $10,330.08, and any remaining portion of the loss carryback from 1964 to 1965 is to be carried back to the year 1963 and the portion necessary to offset petitioner's income for that year determined on the basis of petitioner's income as reported on the tax return for the year 1963 as filed by petitioner in which he reported income of $13,328.70 as wages and $100.48 from interest from the North Hollywood Federal. In determining the income to be absorbed by the net operating loss, the deductions claimed by petitioner shall be considered as reported and the interest claimed as a deduction shall be considered as paid in connection with the Hazeltine property. The real estate taxes shall be considered as paid in connection with business properties and the fire insurance of $334.55 shall be considered as paid in connection with the operation of business property. If any net operating loss remains from the year 1965 after considering the 1964 and 1965 losses first to be carrybacks to the years 1961, 1962, and 1963 as above set forth, this remaining net operating loss shall be considered to be a net operating loss carryover to the year 1966.

OPINION

Petitioner in his brief considers the issues in this case to concern the propriety of the actions of the revenue agents who investigated his income tax returns for the years here in issue. He contends that he has the right to pay the "lowest possible taxes"

under the provisions of the Internal Revenue Code, and that it is incumbent upon respondent or the Court or both to ferret out the necessary facts to compute these "lowest possible taxes." Petitioner's further contention is that respondent in connection with this case has used "trickery, subterfuge, ruse, misrepresentation, fabrication, deceit, prevarication, omission, suppression, cheating, defrauding, surprise and entrapment." Under his heading, "Statutes and Regulations Involved," petitioner states:

> As a layman, the petitioner does not know the provisions of the Internal Revenue Code as amended by Revenue Acts and other Public Laws, and is seeking, needing and relying on the protection of this Court from the Commissioners unfair, immoral and dishonest application of these rules and regulations.

Petitioner's entire brief is geared to arguments similar to that contained in the above quoted statement. He concludes from this argument that since the Commissioner has agreed that facts which were developed from documents that petitioner produced at the trial show substantiation of a number of items which were disallowed in the notice of deficiency for lack of substantiation, there no longer exists any burden on petitioner to show facts in this case. Petitioner's position is that either the respondent or this Court should attempt to determine the lowest tax for any year that petitioner might be entitled to pay from any records in existence whether or not introduced as evidence at the trial of this case. Petitioner justified the numerous changes during the trial of this case in the amounts he claimed to constitute various costs and expenses as follows:

> I also would like to state at this time the reason my figures in all my records I have sub-

mitted might be different is due, let's say, to my poor bookkeeping technique.

Certainly, on the basis of the facts here shown respondent's determination cannot be considered to be arbitrary. After respondent's counsel was permitted to examine the bits and pieces of paper, cancelled checks, bank statements, and various other items assembled in no particular order which petitioner produced at the trial, respondent has conceded that the disallowances which he made in the notice of deficiency are to some extent in error. Likewise respondent has not objected to adjustments for certain items which were not originally claimed by petitioner as deductions on his income tax returns for the years here in issue and not claimed by petitioner in proper amended pleadings which have been substantiated by petitioner. However, these concessions by respondent do not show as petitioner contends that respondent's determination was arbitrary.

The issues here, except that concerning petitioner's right to change the method of computing depreciation, are entirely factual. On the basis of the evidence which has been introduced at the trial, we have made findings of fact and ultimate findings of fact which dispose of the issues raised. This opinion, therefore, is confined to the depreciation issue and comments with respect to some of the considerations that went into our disposition of the factual issues.

Petitioner while acknowledging that he and his brother jointly shared in both profits and losses with respect to the Burbank property, claims that he is entitled to the entire operating loss and foreclosure loss with respect to the Hazeltine property. Petitioner never precisely states the underlying basis of this claim, but from various unrelated statements, it appears that petitioner is contending that all of

the payments with respect to the Hazeltine property were made by him. If this is his contention, it is not supported by the facts since the record shows that some payments were made from rents collected and certain amounts were actually disbursed by Lawrence, the source of the funds for such disbursements not being shown. Also the record shows that amounts were paid on loans which were in the joint names of petitioner and Lawrence's wife but does not show the source of the funds for making such payments. Petitioner recognizes that the Hazeltine property was owned jointly by him and Lawrence with title to Lawrence's portion being in Lawrence's wife and that profits were to be split fifty-fifty. He at no point says that his agreement with Lawrence was not for the splitting of losses fifty-fifty, and from the facts appearing in this record we conclude that both profits and losses were to be shared equally by petitioner and Lawrence and therefore petitioner is entitled to only one-half of the losses with respect to the operation and foreclosure sale of the Hazeltine property.

The only items with respect to the Hazeltine property operating loss which we have added to the amounts respondent agrees are expenses in connection with operation of that property in 1964 and 1965 are amounts for transportation, telephone and office expense. The record affords very meager evidence on which to base the determination of such expenditures. However, considering the fact that the Hazeltine and Burbank properties were 3 miles apart and it would be necessary for the manager of these properties to travel between the two at times, we have made a determination of transportation expenses, and considering the number of apartments in the building and the fact that 1964 was the first year of rentals, we have as best we could determined

our estimate of telephone expenses and expenses for office supplies. With respect to the loss on the foreclosure of the Hazeltine property, respondent states on brief that even though he does not concede that the method used by petitioner in computing this loss is proper, he is willing to have the Court accept petitioner's method for the purpose of this case. He, however, contends that items which constitute operating expenses and are included in computing the deductions for loss on operations should not also be included in determining the loss on foreclosure. We agree with respondent in this respect and have eliminated from the computation of the foreclosure loss items which have been included in the operating expense loss. We also agree with respondent that an interest item in the amount of $980 which was paid by petitioner in 1962 and should have been deducted in that year is not properly part of the principal payment on the mortgage on the Hazeltine property and for that reason is not properly includable in determining the loss on foreclosure. We have therefore determined the loss as computed by respondent except that we have increased the loss by $3,551.98. The evidence with respect to this payment is not as clear as might be desirable but considering it in the light of all the other evidence of record, we have concluded that the $3,551.98 paid by Edward and Lawrence on April 15, 1964, in connection with obtaining a recission of the notice of default and election to sell under deed of trust was in substance a principal payment in connection with the loan on the Hazeltine property which has not otherwise been considered in computing the amount of that loss. We therefore have concluded that a loss in the amount of $29,671.03

resulted and that petitioner is entitled to deduct one-half of such loss.

With respect to the loss claimed by petitioner on the demolition of the building on the property in Canoga Park, California, we have concluded that a demolition loss was incurred by petitioner and Lawrence in the joint operation of this property and as best we could from the evidence have determined the amount of this loss. Petitioner at the trial contended he was the owner of this property and entitled to the entire loss, but on brief in effect conceded that he owned the property jointly with Lawrence's wife, Sylvia. Since the escrow statement with respect to this property dated July 8, 1963, which was placed in evidence, stated that it was the escrow statement of "Mr. Lawrence Harris," respondent argues that there is insufficient evidence in this record to show that petitioner had any interest in the Canoga Park property. Considering all the evidence, we have concluded that petitioner had a one-half interest in this property and have as best we could determined the portion of the $25,000 paid for the property properly applicable to the building by considering the amount of rent being charged on the building as compared to the price of the entire property and testimony given at the trial by petitioner with respect to the building. We have accepted petitioner's testimony at the trial as to the cost of demolishing the building. In support of this testimony petitioner produced and referred to documents regarding the demolition cost on the Canoga Park building. The record would be clearer had these documents been put in evidence. However, considering the record as a whole we have accepted petitioner's testimony in this respect. We do not consider respondent to contend that any

issue other than one of fact exists with respect to petitioner's right to this deduction.[2]

The only items remaining in issue with respect to operating losses on the Burbank property in 1965 and 1966 are the deductions for depreciation and small items of increased expenses claimed by petitioner at the trial over amounts which he originally claimed in his returns. These items included increased telephone and transportation expenses and office expenses. Respondent agreed to the allowance of the transportation and telephone expenses as originally claimed by petitioner on his return for the Burbank property and there is no evidence to substantiate any increased amounts of such expenses or any of the other increased expenses claimed except some small amount of office expense. We have determined an appropriate amount of office expenses as best we could from all of the facts in the record and have set forth such amount in our findings.

There is little in the record to support the depreciation deduction of $4,050 claimed by petitioner on his return. However, obviously depreciation in some

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[2] Sec. 1.165–3(b), Income Tax Regs.

(b) *Intent to demolish formed subsequent to the time of acquisition.* (1) Except as provided in subparagraph (2) of this paragraph, the loss incurred in a trade or business or in a transaction entered into for profit and arising from a demolition of old buildings shall be allowed as a deduction under section 165 (a) if the demolition occurs as a result of a plan formed subsequent to the acquisition of the buildings demolished. The amount of the loss shall be the adjusted basis of the buildings demolished increased by the net cost of demolition or decreased by the net proceeds from demolition. See paragraph (c) of Sec. 1.165–1 relating to amount deductible under section 165. The basis of any building acquired in replacement of the old buildings shall not include any part of the basis of the property demolished.

amount is allowable on this rental property. There is evidence that petitioner and Lawrence in late 1963 obtained a $180,000 loan the proceeds of which they used in the construction of the Burbank apartment building. While this is meager evidence, we consider it sufficient to support depreciation on the whole apartment building of the $4,050 shown as depreciation by petitioner on his return. It is not clear whether petitioner intended this amount of depreciation to represent the entire depreciation or only one-half thereof. However, we have treated the amount as representing the entire depreciation computed on the straight line basis which appears to be the manner in which the depreciation shown on the return was computed.

We have determined the interest deduction to which petitioner is entitled in 1964 in connection with the Burbank property to be the $4,950 which respondent concedes to be deductible in that year. We have reviewed the exhibit which petitioner contends supports his claimed deduction of $6,000, but have found nothing in that exhibit to support a deduction greater than $4,950.

Petitioner has introduced no facts to show any proper computation for depreciation or an additional first-year depreciation allowance or a "bonus allowance" on fixtures under section 179. Petitioner has not even shown figures to support the basis of either the building or fixtures as shown on his return. Respondent accepted the depreciation as claimed on the Hazeltine property and on the basis of this concession we found this amount of depreciation to be sustained. This does not, however, relieve petitioner from proving figures for a claim of additional depreciation. We, therefore, hold that petitioner has failed to prove any facts to support any claim for a depreciation deduction in excess of the amounts shown on his original

returns. The record is clear that petitioner did not make an election to compute depreciation in accordance with the provisions of section 179 [3] or an election to compute depreciation in any way except on the straight line method which was the method shown by his returns to have been used. This Court has held that a taxpayer is not entitled to change the method of computing depreciation from the straight line method to another method without the consent of the Commissioner. Clinton H. Mitchell, 42 T.C. 953, 967 (1964). Therefore, in addition to having shown no facts to support any computation of depreciation, petitioner also has not shown that he complied with the requirement of obtaining the consent of the Commissioner to change the method of computing depreciation.

The final question involves the carrybacks and carryovers of the net operating losses which it appears will result in 1964 and 1965 from the determination of the issues in this case. Apparently petitioner now recognizes the necessity of carrying back losses to prior years before there is a loss carryover to the year 1966. At least from his argument and statements at the trial and on brief, this is a reasonable inference. Also, apparently the parties are in agreement that the 1964 operating loss, if any, should first be carried back to 1961 and then to 1962 and 1963 if there is any remaining and that the 1965 loss should first be carried back to 1962 and then to 1963. Also, there appears to

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[3] SEC. 179(c), I.R.C. 1954 provides as follows:

(c) Election.—

(1) *In general.*—The election under this section for any taxable year shall be made within the time prescribed by law (including extensions thereof) for filing the return for such taxable year. The election shall be made in such manner as the Secretary or his delegate may by regulations prescribe.

be no disagreement between the parties with respect to petitioner's income in the years 1961 and 1963 to which a net operating loss is to be applied. The only difference between the parties in 1962 concerns whether petitioner's reported income should be increased by some amount of interest applicable to his savings accounts. While it is reasonable to assume from the number of savings accounts which petitioner had in 1962 that he must have received some interest, there is little evidence in the record to show the amount of such interest. However, the record does show that petitioner paid $980 or at least half of that amount in connection with the loan on the Hazeltine property in 1962 and it would appear he would have been entitled to deduct this interest payment in that year had he claimed it. The fact that petitioner in 1962 claimed the $1,000 standard deduction in computing his income is not a problem since we are here concerned only with petitioner's 1962 "operating income" for the purpose of determining the amount of loss carryback which would be absorbed in 1962. We have concluded in the state of the record here to consider the income as reported by petitioner in 1962 to be the proper starting point in determining the amount of the loss carryback which will be absorbed in that year. As to the year 1963, the record is even more confused. Petitioner apparently had claimed an overpayment from taxes withheld and because of an office audit had the amount of overpayment he had claimed reduced. In any event there is no showing in this record what ultimate determination was made with respect to the audit. Two of the items in that report concern items which would not affect the computation of the amount of net operating loss carryback absorbed in the year 1963. The item that would

affect this computation is the deduction for fire insurance with respect to an apartment building. This record is sufficient to show that in computing the amount of the net operating loss absorbed by carryback to 1963 this deduction should be made from petitioner's reported income. However, from the record we conclude that respondent does not contend that any change should be made in petitioner's 1963 income as reported and therefore we have no issue in this respect.

It cannot, of course, be determined whether any amount of net operating loss will remain to be carried over to 1966 until a recomputation has been made under Rule 50, but if there does exist any such remaining loss, such remaining loss would be a proper carryover to 1966. If petitioner is still contending that he should first be permitted to carry any net operating loss for 1965 over to 1966 as a "carryback" and then to carry back to the years 1961, 1962, and 1963 any remaining losses after adjusting 1966, we do not agree with his contention. Section 172(b)(1) specifically provides, with exceptions not applicable to this taxpayer, that a net operating loss for any taxable year ending after December 31, 1957, shall be a net operating loss carryback to each of the 3 taxable years preceding the taxable year of such loss, and that the net operating loss shall be first carried to the earliest year to which it may be carried. The portion of such loss which shall be carried to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable incomes for each of the prior taxable years to which such loss may be carried.

Decision will be entered under Rule 50.

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IN THE SUPREME COURT OF THE UNITED STATES

SUPREME COURT, U. S.
FILED
FEB 16 1973
MICHAEL RODAK, JR., CLERK

October Term 1972

No. 72-956

Edward Harris,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

Supplemental Appendix to Petition

Edward Harris, pro se
14335 Burbank Blvd.
Van Nuys, Calif. 91401

T.C. Memo. 1970-331

UNITED STATES TAX COURT

EDWARD HARRIS, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 2207-68

Filed November 25, 1970.

Edward Harris, pro se.

Robert H. Feldman, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION.

SCOTT, Judge: Respondent determined deficiencies in petitioner's income tax for the calendar years 1964, 1965, and 1966 in the amounts of $2,306.96, $1,370.28, and $1,996.99, respectively.

At the trial petitioner filed an amendment to petition in which he alleged that he is entitled to refunds for the years 1961, 1962, and 1963 in the amounts of $1,552.92, $1,859.02, and $276.21, respectively because of net operating loss carrybacks.

Respondent on March 6, 1970, filed a Motion to Dismiss for Lack of Jurisdiction and to Strike as to the Taxable Years 1961,

1962 and 1963 on the ground that no deficiency notice had been mailed to petitioner with respect to these years and that they were involved in this case only insofar as it might be necessary to determine petitioner's income for these years to find what amount, if any, of net operating loss petitioner would be entitled to carry over from the years 1964 or 1965 to the year 1966.

On March 16, 1970, an order was entered that the parties present arguments in their briefs with respect to respondent's motion. Petitioner in his brief did not contend that he had been issued a notice of deficiency for any of the years 1961, 1962, and 1963, but contended that this Court should have jurisdiction to grant refunds for each of the years involved.

It is well settled that this Court has jurisdiction to determine a deficiency in or overpayment of tax by a taxpayer only for those years with respect to which a notice of deficiency has been mailed by the Commissioner to such taxpayer and that the jurisdiction of this Court over other years is limited to consideration of such facts as may be necessary to correctly re-

determine the taxpayer's tax liability for a year with respect to which a deficiency notice has been mailed to the petitioner. Sections 6212, 6213, and 6214, I.R.C. 1954.[1] We, therefore, sustain respondent's motion and will enter an appropriate order dismissing petitioner's petition insofar as it attempts to place in issue the years 1961, 1962, and 1963. However, we will consider the evidence in the record with respect to those years to the extent necessary to permit a determination of whether there is a net operating loss carryover from either 1964 or 1965 to the year 1966 and, if so, the amount of such loss carryover.

Having disposed of the jurisdictional question, the remaining issues for decision are (1) the proper amount of deductions to which petitioner is entitled in the years 1964 and 1965 for operating losses on two rental properties which he owned jointly with either his brother or his brother's wife, (2) the amount of petitioner's loss on foreclosure in 1965 of the mortgage on one of these properties, (3) the amount of

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[1] All references are to the IRC of 1954.

the operating profit or loss with respect to the other such property in 1966, (4) whether petitioner is entitled to a demolition loss with respect to another property in 1964 and if so the amount thereof, and (5) how should the net operating losses, if any were sustained by petitioner in the years 1964 and 1965, be applied in determing whether petitioner is entitled to an operating loss carryover to the year 1966.

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly.

Petitioner, an individual who resided in Van Nuys, California, at the time of the filing of the petition in this case, filed his individual Federal income tax returns for the calendar years 1964, 1965, and 1966 with the district director of internal revenue at Los Angeles, California.

Sometime prior to the year 1963 petitioner and his brother, Lawrence Harris (hereinafter referred to as Lawrence) entered into an oral agreement with respect to the purchase of certain properties, the construction of buildings thereon, and the sale of these buildings. Lawrence was an archi-

tectural engineer. He and petitioner agreed that petitioner would furnish the "front" money to build certain buildings and Lawrence would do the architectural and contractor work. The buildings were to be apartment buildings. Petitioner and Lawrence planned to rent the apartments in each building as soon as the construction of that building was completed and immediately after the various apartments had been rented, sell the building. They agreed that for the services which each was to render he would receive 50 percent of the expected profit.

In accordance with their agreement, petitioner and Lawrence in 1962 purchased property at 6922 Hazeltine Avenue, in Van Nuys, California (hereinafter referred to as the Hazeltine property), and in 1963 constructed thereon a 16-unit apartment house. The title to this property was at sometime during 1963 placed in the names of petitioner and Sylvia Harris, the wife of Lawrence. The parties, however, understood that Sylvia held title to the property on behalf of Lawrence.

During 1963 or 1964 petitioner and

Lawrence acquired property at 14335 Burbank Boulevard in Van Nuys, California (hereinafter referred to as the Burbank property), and built a 20-unit apartment building thereon in 1964.

In 1963 either petitioner or Lawrence or the two of them or petitioner jointly with Sylvia acquired a piece of property in Canoga Park, California at a cost of $25,000. The settlement statement for the closing of the purchase of this property was made in the name of Lawrence. There was on this property at the time it was acquired a house which was being rented at $85 per month. During the year 1964 rents from the apartments on the Hazeltine property were received in the amounts of $13,720. The amounts so received were used to pay various expenses in connection with the operation of the Hazeltine property. On a straight line basis which was the basis used by petitioner on his tax return for the years 1964 and 1965, depreciation on the Hazeltine property was $6,150 for the year 1964 and $4,462.50 for the period from January 1, 1965, until the time the mortgage on the Hazeltine property was foreclosed in 1965. For the year 1964 repair costs on the Haz-

eltine property were $401.64 and other operating expenses were $17,461.12. These operating expenses did not include any amount for telephone, transportation, or office expenses. For 1965 operating expenses on the Hazeltine property of $9,868.36 were sustained without taking into consideration a $213 note payment which respondent on brief conceded was properly a part of operating expenses. The $9,868.36 operating expenses did not include any amount for transportation, telephone, and office expenses incurred in connection with the rental operation.

In the year 1964, and for part of the year 1965, petitioner lived in the Hazeltine property and for the remainder of 1965 lived in the Burbank property. The Hazeltine and Burbank properties are about 3 miles apart.

During the year 1965 rents were received from the apartments on the Hazeltine property in the amount of $2,900.

Petitioner had a telephone in his apartment in either the Hazeltine or Burbank property which he used for his personal use and also used for necessary calls with respect to rental of apartments. Petitioner during the years 1964 and 1965 owned a

Chevrolet automobile which he used when necessary to drive between the Hazeltine and Burbank properties. Petitioner also at times wrote letters in connection with the rental operations of the Hazeltine property on stationery he purchased for that purpose and purchased stamps for mailing these letters. In addition to the other operating expenses of the Hazeltine property there were telephone expenses of $60 in each of the years 1964 and 1965, transportation expenses of $200 in each of these years, and office expenses of $60 in each of these years.

The construction of an apartment house on the Hazeltine property in 1963 was financed primarily by a loan from the American Savings and Loan Association which was granted in the name of Edward Harris and Sylvia Harris and from a second mortgage loan on the property. However, there were payments in the total amount of $19,777.36 in connection with the construction of the apartment building which were made from funds other than the proceeds from the construction loan and second mortgage loan. The disbursements which totaled the $19,777.36 were made by Lawrence, the

general contractor on the project. Also, a downpayment in the amount of $10,840 was made on the property not from loan proceeds into an escrow account. In 1963 and 1964 the amounts of $1,021.30 and $2,510.84, respectively, were made as a reduction in principal on the American Savings and Loan Association mortgage. In late 1962 a deposit in the amount of $700 was made with the American Savings and Loan Association in connection with obtaining the construction loan. The second mortgage loan obtained by petitioner and Lawrence was from Bobby G. and Betty Jeanne Spicer. The funds obtained from this loan were used in construction of the apartment on the Hazeltine property. During 1962 $724 of the principal of this second mortgage was repaid and during 1963 $1,158.05 of the principal of this loan was repaid. In 1964 payments on the Spicer note were in arrears and the Spicers filed a notice of default and election to sell under deed of trust. In order to obtain the filing by the Spicers of a rescission of this notice of default and election to sell under deed of trust, petitioner and his brother Lawrence, on April 15, 1964, paid $3,551.98 to the trustee under the

deed of trust, Woodnard, Inc. The rescission of the notice recited that the beneficiaries (the Spicers) had heretofore delivered to the trustee a declaration of default and demand for sale and that they now gave notice that they hereby rescinded, cancelled, and withdrew the declaration of default. The receipt for the payment of $3,551.98 carried the legend "Received from Mr. Lawrence Harris" the amount of $3,551.98. Above the name "Lawrence" on the receipt was written the name "Edward". In addition to the principal payment of $724 on the Spicer note in 1962 there was an interest payment of $980 on that note.

For the years 1965 and 1966 there was depreciation sustained and operating expenses incurred by petitioner and Lawrence in connection with the rental of apartments on the Burbank property in the following amounts:

	1965	1966
Depreciation	$4,050.00	$4,050.00
Interest	16,456.72	10,468.54
Property taxes	3,625.66	2,285.48
Other expenses	9,589.20	6,251.77
Total	$29,671.58	$19,005.79

Included in other expenses for each of the years 1965 and 1966 are $250 for trans-

portation expense, $150 for telephone expense and $60 for office expenses.

In late 1963 petitioner and Lawrence borrowed $180,000 from parties by the name of Moore. These funds were used in construction of the apartment building on the Burbank property and the loan was secured by a second deed of trust on the Burbank property. In 1964 petitioner and Lawrence paid $9,900 of interest in connection with this $180,000 loan on the Burbank property, no portion of which was claimed to be deductible by petitioner on his 1964 income tax return.

After the purchase of the Canoga Park, California property in 1963, petitioner or his brother attempted to collect the rent each month from the tenant who was living in the house on the property. The rent would not be timely paid but the tenant would make promises to pay the next week or the next month. After some length of time the tenant left the house and when petitioner and Lawrence inspected the house after the tenant had left they found broken windows, plumbing removed, doors gone, and the house in an unlivable condition. Thereafter they received not-

ices from the Fire Department with respect to the lack of safety of the house and finally received a citation sometime late in 1964, requiring them to either repair or demolish the house since the house in its present condition constituted a fire hazard. After this citation had been received, the house was demolished at a total cost of $1,383.

As of September 6, 1962, petitioner had $35,729 in 23 separate savings accounts in the Los Angeles area. The funds in these savings accounts had been accumulated by petitioner gradually and the moneys from these accounts were withdrawn at varying times by petitioner to purchase real property.

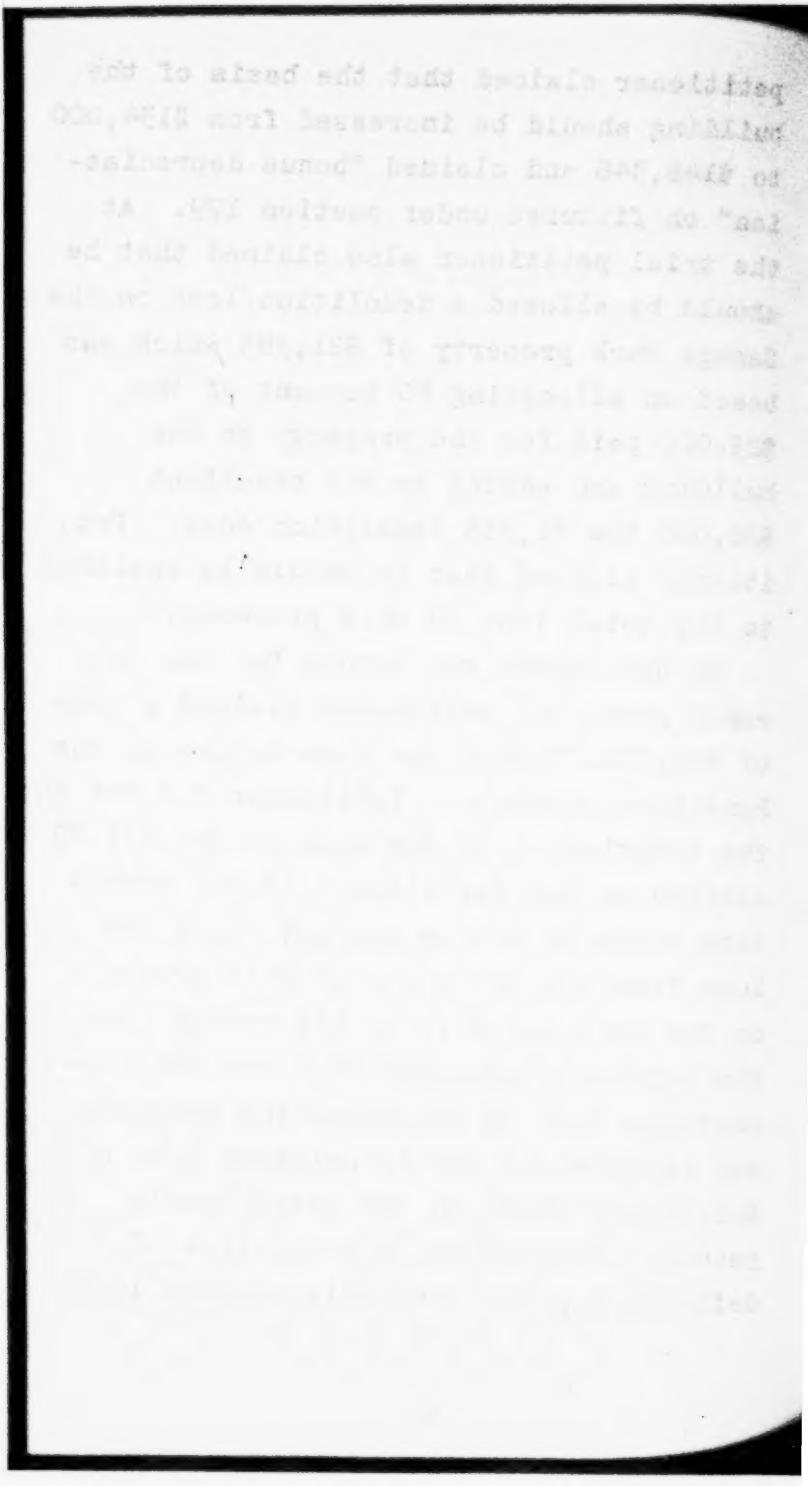
Petitioner on his original income tax return for the calendar year 1964 claimed a loss on rental of the Hazeltine property of $10,292.76, computed by subtracting from total rents received of $13,720 depreciation on the straight line basis of $6,150, repairs of $401.64 and other expenses of $17,461.12.

Respondent in his notice of deficiency disallowed the claimed loss of $10,292.76 with the statement that it was disallowed for lack of substantiation.

Petitioner, after receipt of the notice of deficiency which was dated March 11, 1968, filed with respondent an amended income tax return for the year 1964 which he signed under date of April 12, 1968. On this amended return petitioner claimed a loss from the rental of the Hazeltine property of $11,659.43 computed by subtracting from rents received of $13,720, depreciation of $7,516.67, repairs of $401.64, and other expenses of $17,461.12. With this amended return for the year 1964 was filed a claim for refund for the year 1961 which was based on the carryback of the loss shown on the amended 1964 return to the year 1961. In the amended return petitioner claimed also a loss on the demolition of the building on the Canoga Park, California property in the amount of $1,383. On both the original and amended return the basis of the building on the Hazeltine property was shown as $134,000 and the basis of the fixtures as $13,000. The increased depreciation claimed in the amended return resulted from a claim for additional first year depreciation on the amended return which had not been claimed on the original return. At the trial

petitioner claimed that the basis of the building should be increased from $134,000 to $146,346 and claimed "bonus depreciation" on fixtures under section 179. At the trial petitioner also claimed that he should be allowed a demolition loss on the Canoga Park property of $21,383 which was based on allocating 80 percent of the $25,000 paid for the property to the building and adding to the resultant $20,000 the $1,383 demolition cost. Petitioner claimed that he should be entitled to the total loss on this property.

On his income tax return for the calendar year 1965 petitioner claimed a loss of $48,731.77 from the foreclosure on the Hazeltine property. Petitioner did not show the computation of the loss of $48,731.77 claimed on the foreclosure of the Hazeltine property but he did not claim any loss from the operation of this property on the rent schedule on his return, and the parties stipulated that the 1965 operations loss on the Hazeltine property was included in the foreclosure loss of $48,731.77 shown on the petitioner's return. Respondent in his notice of deficiency disallowed this claimed loss



for lack of substantiation. Petitioner in a reply to respondent's answer claimed that the foreclosure loss on the Hazeltine property which he sustained in 1965 should be $50,689.55 computed as follows:

Downpayments and payments on loan	$19,135.37
Construction costs and construction loan paid by petitioner	19,346.45
1965 operating loss from rentals at 6922 Hazeltine Avenue, Van Nuys, California	11,207.73
Transportation expenses	1,000.00
Total loss claimed on foreclosure	$50,689.55

At the trial petitioner claimed that this loss should be increased by an additional amount of $3,551.98 which he paid on the Spicer note to obtain the recission of the notice of default and election to sell under deed of trust. At the trial petitioner also claimed that depreciation which was included in the claimed loss in the amount of $4,462.50 should be increased by the allowance of an increased basis for the Hazeltine building and "bonus depreci-

ation" under section 179 on fixtures.

Petitioner claimed no deduction with respect to the Burbank property on his return for the calendar year 1964 but at the trial claimed to be entitled to a deduction of $6,000 for interest paid in 1964 with respect to the loan on the Burbank property. On his return for 1965 petitioner claimed a deduction of a loss on operation of the Burbank property of $7,655.29 computed by subtracting from rents received of $11,200 depreciation of $4,050 and repairs and other expenses of $14,805.29. Respondent in his notice of deficiency disallowed the claimed loss from rental of the Burbank property of $7,655.25 for lack of substantiation.

At the trial petitioner claimed that the expenses in connection with the operation of the Burbank property for the year 1965, exclusive of depreciation, were $31,802.76 of which one-half or $15,901.38 was deductible by him.

On his income tax return for the calendar year 1966 petitioner claimed a loss from the operation of the Burbank building of $3,704.79 computed by subtracting from total rents received of $9,818 depreciation

of $4,050 and other expenses of $9,472.79. Petitioner also claimed a deduction for "net operating loss carryback (1966)" of $6,283.15.

Respondent in his notice of deficiency disallowed these claimed deductions for lack of substantiation.

On April 15, 1968, petitioner filed a claim for refund of income tax for the year 1962 of $1,709 which he showed to be computed as follows:

Due to net operating loss suffered in 1965 of	$46,576.70	
	6,283.15	Used in 1966
	$40,293.55	Carryover
	10,330.08	To be applied to 1962
	$29,963.47	Carryover

Also on April 15, 1968, petitioner filed a claim for refund of income tax for the year 1963 in the amount of $276.21, which he computed by showing an operating loss sustained in 1965 of $46,576.70, with $16,613.23 previously used in 1966 and 1962 with a carryover of $29,963.47 of which $1,646.53 was to be applied to 1963.

Petitioner on his 1962 income tax return reported total income of $10,330.08 which was shown to have been received from wages, and claimed a standard deduction of $1,000, showing his total net income to be $9,330.08. Petitioner reported no income from interest for the year 1962 and claimed no business expense deductions. For the year 1963 petitioner on his Federal income tax return reported wages of $13,328.70 and interest income from North Hollywood Federal of $100.48, making a total income of $13,429.18. From this amount he subtracted itemized deductions of $11,782.65 which consisted of interest expense of $9,835.41 paid in connection with an apartment house to American Savings and Loan Association and the Spicers, taxes of $1,479.69 and other deductions of $467.55, which included a deduction of $334.55 for "Apt. House Fire Insurance."

Petitioner's 1963 income tax return was the subject of a "U.S.Treasury Department- Internal Revenue Service Report of Individual Income Tax Audit Changes" attached to a form letter addressed to him under date of August 14, 1964, by the district director of internal revenue, in

which it was proposed to disallow a deduction he had claimed of $600 for a dependency exemption for his mother, to disallow computation of his tax as head of a household, and to disallow a deduction for "Fire Insurance" of $334.55. The record does not show whether any adjustments were finally made in petitioner's income as reported for the year 1963 in accordance with these proposed adjustments.

Respondent takes the position that petitioner's 1962 reported income should be increased by at least $1,000 in determining the amount of any net operating loss carryback from 1964 or 1965 which would be absorbed by the income of that year. The $1,000 respondent claims is a minimum amount of interest which petitioner should have reported from the 23 various savings accounts which he had in the greater Los Angeles area.

ULTIMATE FINDINGS OF FACT

1. The Hazeltine property, the Burbank property, and the Canoga Park, California property were owned jointly by petitioner and Lawrence and were operated by petitioner and Lawrence in a joint venture in which each was entitled to share in profits or losses to the

extent of 50 percent.

2. In the year 1964 petitioner and Lawrence sustained an operating loss on the Hazeltine property in the amount of $11,301.24 of which petitioner is entitled to deduct one-half or $5,650.62.

3. Petitioner for the calendar year 1964 is entitled to deduct in addition to the interest deductions claimed by him on his income tax return for that year, the amount of $4,950, which represents one-half of the $9,900 interest paid by petitioner and Lawrence with respect to the Burbank property in the year 1964.

4. For the year 1964 petitioner is entitled to deduct $3,691.50 as a demolition loss in connection with the Canoga Park, California property which is computed by taking one-half of $6,000 representing the part of the purchase price of the property allocable to the building plus one-half of the $1,383 demolition cost.

5. For the calendar year 1965 petitioner is entitled to deduct a loss of $5,660.79 from operation of the Burbank property. Depreciation and expenses on the Burbank property which are deductible by petitioner and total $16,860.79 are com-

puted by taking one-half of the depreciation of $4,050 claimed on petitioner's income tax return for that year and one-half of the $29,671.58 of expenses which we determined in our findings were sustained in connection with that property. From these expenses is deducted the $11,200 of rents shown by petitioner on his return to be his portion of the rents received from this property.

6. For the year 1965 petitioner is entitled to deduct as an operating loss in connection with the Hazeltine property $5,981.93, computed by deducting from total expenses in connection with the operation of the property as set forth in our findings of fact of $10,401.36 plus total dereciation on the property of $4,462.50 (a total of $14,863.86) the total rental received of $2,900 and dividing the resultant loss of $11,963.86 by two. Petitioner is entitled to deduct the amount of $14,835.51 for the year 1965 as a loss on the foreclosure sale on the Hazeltine property, which amount is computed by dividing the computed adjusted basis of the property to petitioner and Lawrence equally between them On the basis of this record and be-

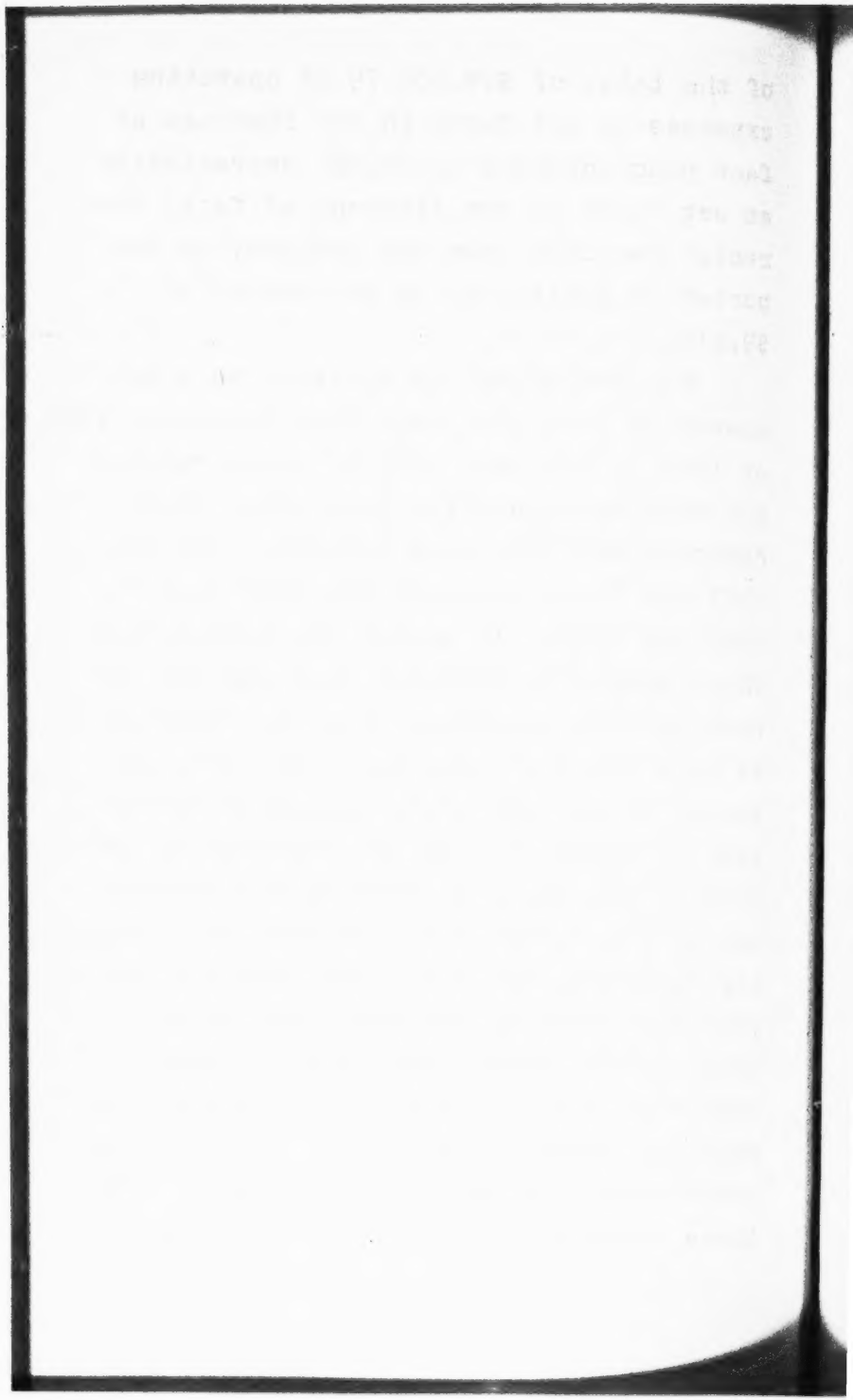
cause of respondent's agreement as to certain items to be included in the computation of basis, we have determined a basis in the property of $29,671.03, composed of the following items:

Downpayment and payments of principal on loan used to construct the property	$16,954.19
Construction costs disbursed by Lawrence from funds other than those received from the construction loans	19,777.36
Payment to Spicers to obtain rescission of order of sale under deed of trust	3,551.98
Total	$40,283.53
Less depreciation claimed and allowed on building for the years 1964 and 1965	10,612.50
	$29,671.03

7. For the year 1966 petitioner is entitled to deduct $1,709.89 as a loss on the operation of the Burbank property which is computed by subtracting from one-half

of the total of $19,005.79 of operating expenses as set forth in our findings of fact plus one-half of $4,050 depreciation as set forth in our findings of fact, the rental received from the property as reported by petitioner on his return of $9,818.

8. Petitioner is entitled to a net operating loss carryover from the years 1964 or 1965 to the year 1966 if there remains any such net operating loss after first carrying the 1964 loss to 1961, 1962 and 1963 and first carrying the 1965 loss to 1962 and 1963. In making the computation there should be deducted from any net operating loss resulting from the findings we have set forth for the year 1964, an amount of net operating carryback necessary to absorb the income reported by petitioner for the year 1961 on his Federal income tax return for that year and taking any remaining net operating loss for the year 1964 over to the year 1962 as a carryback to that year. For the year 1962 this loss, if any, is to be deducted from the income of $10,330.08 reported by petitioner from wages for that year. If there remains some net operating loss



from the year 1964, it is to be a carryback to petitioner's year 1963. If there does not remain any such loss carryback then any loss carryback computed to result from a computation for the year 1965 shall be used in the year 1962 to the extent necessary to absorb the remaining portion of the $10,330.08, and any remaining portion of the loss carryback from 1964 or 1965 is to be carried back to the year 1963 and the portion necessary to offset petitioner's income for that year determined on the basis of petitioner's income as reported on the tax return for the year 1963 as filed by petitioner in which he reported income of $13,328.70 as wages and $100.48 from interest from the North Hollywood Federal. In determining the income to be absorbed by the net operating loss, the deductions claimed by petitioner shall be considered as reported and the interest claimed as a deduction shall be considered as paid in connection with the Hazeltine property. The real estate taxes shall be considered as paid in connection with business properties and the fire insurance of $334.55 shall be considered as paid in connection with the operation of business property.

If any net operating loss remains from the year 1965 after considering the 1964 and 1965 losses first to be carrybacks to the years 1961, 1962, and 1963 as above set forth, this remaining net operating loss shall be considered to be a net operating loss carryover to the year 1966.

OPINION

Petitioner in his brief considers the issues in this case to concern the propriety of the actions of the revenue agents who investigated his income tax returns for the years here in issue. He contends that he has the right to pay the "lowest possible taxes" under the provisions of the Internal Revenue Code, and that it is incumbent upon respondent or the Court or both to ferret out the necessary facts to compute these "lowest possible taxes." Petitioner's further contention is that respondent in connection with this case has used "trickery, subterfuge, ruse, misrepresentation, fabrication, deceit, prevarication, omission, suppression, cheating, defrauding, surprise, and entrapment." Under his heading "Statutes and Regulations Involved," petitioner

states:

> As a layman, the petitioner does not know the provisions of the Internal Revenue Code as amended by Revenue Acts and other Public Laws, and is seeking, needing and relying on the protection of this Court from the Commissioners unfair, immoral and dishonest application of these rules and regulations.

Petitioner's entire brief is geared to that contained in the above quoted statement. He concludes from this argument that since the Commissioner has agreed that facts which were developed from documents that petitioner produced at the trial show substantiation of a number of items which were disallowed in the notice of deficiency for lack of substantiation, there no longer exists any burden on petitioner to show facts in this case. Petitioner's position is that either the respondent or this Court should attempt to determine the lowest tax for any year that petitioner might be entitled to pay from any records in existence whether or not introduced as evidence at the trial of this case. Petitioner justified the numerous changes during the

trial of this case in the amounts he claimed to constitute various costs and expenses as follows:

> I also would like to state at this time the reason my figures in all my records I have submitted might be different is due, let's say, to my poor bookkeeping technique.

Certainly, on the basis of the facts here shown respondent's determination cannot be considered to be arbitrary. After respondent's counsel was permitted to examine the bits and pieces of paper, cancelled checks, bank statements, and various other items assembled in no particular order which petitioner produced at the trial, respondent has conceded that the disallowances which he made in the notice of deficiency are to some extent in error. Likewise respondent has not objected to adjustments for certain items which were not originally claimed by petitioner as deductions on his income tax returns for the years here in issue and not claimed by petitioner in proper amended pleadings which have been substantiated by petitioner. However, these concessions by respondent do not show as petitioner con-

tends that repondent's determination was arbitrary.

The issues here, except that concerning petitioner's right to change the method computing depreciation, are entirely factual. On the basis of the evidence which has been introduced at the trial, we have made findings of fact and ultimate findings of fact which dispose of the issues raised. This opinion, therefore, is confined to the depreciation issue and comments with respect to some of the considerations that went into our disposition of the factual issues.

Petitioner while acknowledging that he and his brother jointly shared in both profits and losses with respect to the Burbank property, claims that he is entitled to the entire operating loss and foreclosure loss with respect to the Hazeltine property. Petitioner never precisely states the underlying basis of this claim, but from various unrelated statements, it appears that petitioner is contending that all of the payments with respect to the Hazeltine property were made by him. If this is his contention, it is not supported by the facts since the record shows that some payments were made from

rents collected and certain amounts were actually disbursed by Lawrence, the source of the funds for such disbursements not being shown. Also the record shows that amounts were paid on loans which were in the joint names of petitioner and Lawrence's wife but does not show the source of the funds for making such payments. Petitioner recognizes that the Hazeltine property was owned jointly by him and Lawrence with title to Lawrence's portion being in Lawrence's wife and that profits were to be split fifty-fifty. He at no point says that his agreement with Lawrence was not for the splitting of losses fifty-fifty, and from the facts appearing in this record we conclude that both profits and losses were to be shared equally by petitioner and Lawrence and therefore petitioner is entitled to only one-half of the losses with respect to the operation and foreclosure sale of the Hazeltine property.

The only items with respect to the Hazeltine property operating loss which we have added to the amounts respondent agrees are expenses in connection with operation of that property in 1964 and

and 1965 are amounts for transportation, telephone and office expense. The record affords very meager evidence on which to base the determination of such expenditures. However, considering the fact that the Hazeltine and Burbank properties were 3 miles apart and it would be necessary for the manager of these properties to travel between the two at times, we have made a determination of transportation expenses, and considering the number of apartments in the building and the fact that 1964 was the first year of rentals, we have as best we could determined our estimate of telephone expenses and expenses for office supplies. With respect to the loss on the foreclosure of the Hazeltine property, respondent states on brief that even though he does not concede that the method used by petitioner in computing this loss is proper, he is willing to have the Court accept petitioner's method for the purpose of this case. He, however, contends that items which constitute operating expenses and are included in computing the deductions for loss on operations should not also be included in

determining the loss on foreclosure. We agree with respondent in this respect and have eliminated from the computation of the foreclosure loss items which have been included in the operating expense loss. We also agree with respondent that an interest item in the amount of $980 which was paid by petitioner in 1962 and should have been deducted in that year is not properly part of the principal payment on the mortgage on the Hazeltine property and for that reason is not properly included in determining the loss on foreclosure. We have therefore determined the loss as computed by respondent except that we have increased the loss by $3,551.98. The evidence with respect to this payment is not as clear as might be desirable but considering it in the light of all the other evidence of record, we have concluded that the $3,551.98 paid by Edward and Lawrence on April, 15, 1964, in connection with obtaining a rescission of the notice of default and election to sell under deed of trust was in substance a principal payment in connection with the loan on the Hazeltine property which has not otherwise been considered in computing the amount of that

loss. We therefore have concluded that a loss in the amount of $29,671.03 resulted and that petitioner is entitled to deduct one-half of such loss.

With respect to the loss claimed by petitioner on the demolition of the building on the property in Canoga Park, California, we have concluded that a demolition loss was incurred by petitioner and Lawrence in the joint operation of this property and as best we could from the evidence have determined the amount of this loss. Petitioner at the trial contended he was the owner of this property and entitled to the entire loss, but on brief in effect conceded that he owned the property jointly with Lawrence's wife, Sylvia. Since the escrow statement with respect to this property dated July 8, 1963, which was placed in evidence, stated that it was the escrow statement of "Mr. Lawrence Harris," respondent argues that there is insufficient evidence in this record to show that petitioner had any interest in the Canoga Park property. Considering all the evidence, we have concluded that petitioner had a one-half interest in this property and have as best we could

determined the portion of the $25,000 paid for the property applicable to the building by considering the amount of rent being charged on the building as compared to the price of the entire property and testimony at the trial by petitioner with respect to the building. We have accepted petitioner's testimony at the trial as to the cost of demolishing the building. In support of this testimony petitioner produced and referred to documents regarding the demolition cost on the Canoga Park building. The record would be clearer had these documents been put in evidence. However, considering the record as a whole we have accepted petitioner's testimony in this respect. We do not consider respondent to contend that any issue other than one of fact exists with respect to petitioner's right to this deduction.[2]

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[2]Sec. 1.165-3(b), Income Tax Regs.

(b) Intent to demolish formed subsequent to the time of acquistion. (1) Except as provided in subparagraph (2) of this paragraph, the loss incurred in a trade or business or in a transaction entered into for profit and arising from a demolition of old buildings shall be allowed as a deduction under section 165(a) if the

The only items renaining in issue with respect to operating losses on the Burbank property in 1965 and 1966 are the deductions for depreciation and small items of increased expenses claimed by petitioner at the trial over amounts which he originally claimed in his returns. These items included increased telephone and transportation expenses and office expenses. Respondent agreed to the allowance of the transportation and telephone expenses as originally claimed by petitioner on his return for the Burbank property and there is no evidence to substantiate any of the other increased expenses claimed except some small amount of office expense. We have determined an appropriate amount of office expenses as best we could from all

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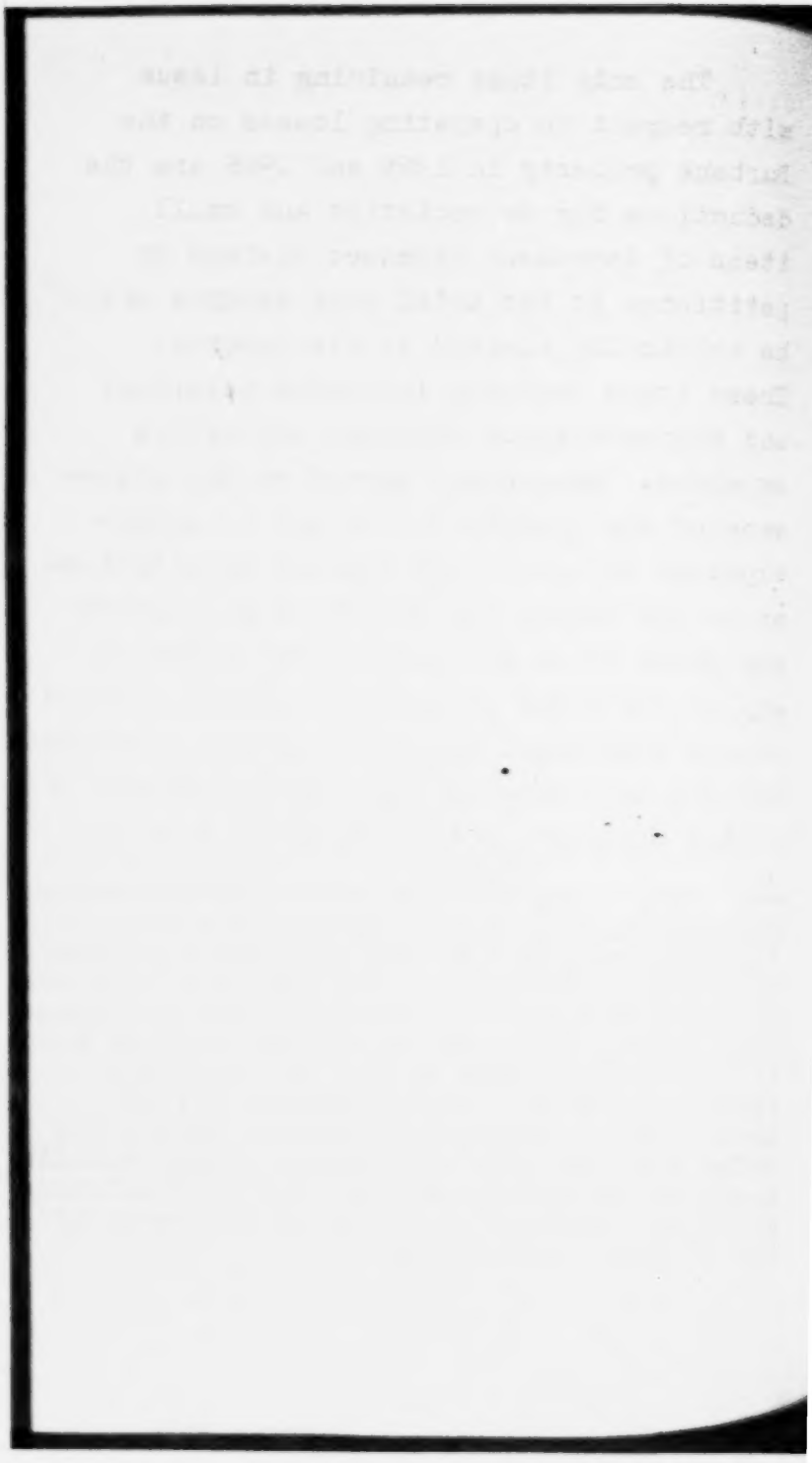
demolition occurs as a result of a plan formed subsequent to the acquistion of the buildings demolished. The amount of the loss shall be the adjusted basis of the buildings demolished increased by the net cost of demolition or decreased by the net proceeds from demolition. See paragraph (c) of Sec. 1.165-1 relating to amount deductible under section 165. The basis of any building acquired in replacement of the old buildings shall not include any part of the basis of the property demolished.



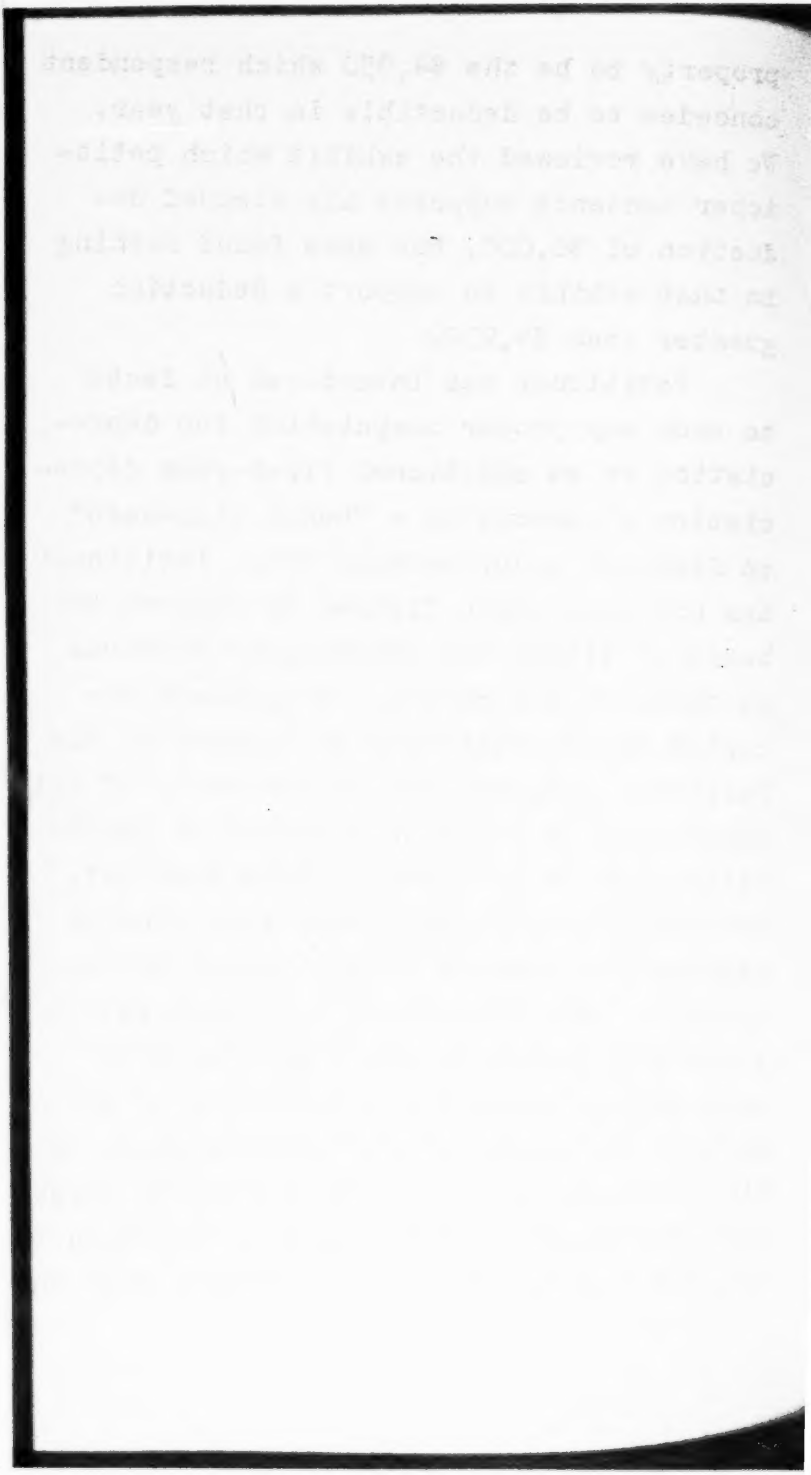
of the facts in the record and have set forth such amount in our findings.

There is little in the record to support the depreciation deduction of $4,050 claimed by petitioner on his return. However, obviously depreciation in some amount is allowable on this rental property. There is evidence that petitioner and Lawrence in late 1963 obtained a $180,000 loan the proceeds of which they used in the construction of the Burbank apartment building. While this is meager evidence, we consider it sufficient to support depreciation on the wlole apartment building of the $4,050 shown as depreciation by petitioner on his return. It is not clear whether petitioner intended this amount of depreciation to represent the entire depreciation or only one-half thereof. However, we have treated the amount as representing the entire depreciation computed on the straight line basis which appears to be the manner in which the depreciation shown on the return was computed.

We have determined the interest deduction to which petitioner is entitled in 1964 in connection with the Burbank

property to be the $4,950 which respondent concedes to be deductible in that year. We have reviewed the exhibit which petitioner contends supports his claimed deduction of $6,000, but have found nothing in that exhibit to support a deduction greater than $4,950.

Petitioner has introduced no facts to show any proper computation for depreciation or an additional first-year depreciation allowance or a "bonus allowance" on fixtures under section 179. Petitioner has not even shown figures to support the basis of either the building or fixtures as shown on his return. Respondent accepted the depreciation as claimed on the Hazeltine property and on the basis of this concession we found this amount of depreciation to be sustained. This does not, however, relieve petitioner from proving figures for a claim of additional depreciation. We, therefore, hold that petitioner has failed to prove any facts to support any claim for a depreciation deduction in excess of the amounts shown on his original returns. The record is clear that petitioner did not make an election to compute depreciation in accordance with the



provisions of section 179[3] or an election to compute depreciation in ant way except on the straight line method which was the method shown by his returns to have been used. This Court has held that a taxpayer is not entitled to change the method of computing depreciation from the straight line method to another method without the consent of the Commissioner. Clinton H. Mitchell, 42 T.C. 953 (1964). Therefore, in addition to having shown no facts to support any computation of depreciation, petitioner also has not shown that he complied with the requirement of obtaining the consent of the Commissioner to change the method of computing depreciation.

The final question involves the carrybacks and carryovers of the net operating losses which it appears will result in 1964

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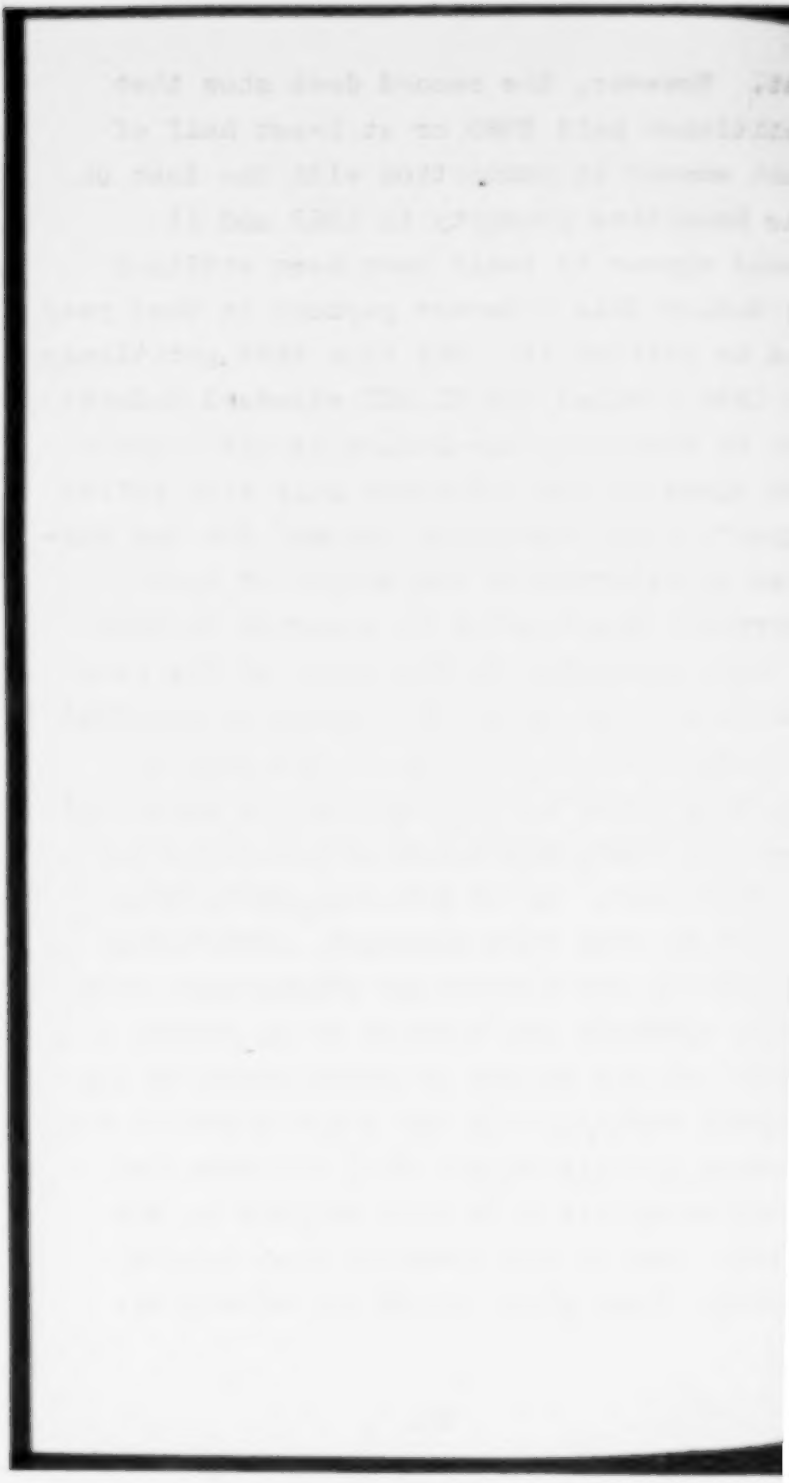
[3]SEC. 179(c), I.R.C. 1954 provides as follows:

(c) Election.--

(1) In general. --The election under this section for any taxable year shall be made within the time prescribed by law (including extensions thereof) for filing the return for such taxable year. The election shall be made in such manner as the Secretary or his delegate may by regulations prescribe.

and 1965 from the determination of the issues in this case. Apparently petitioner now recognizes the necessity of carrying back losses to prior years before there is a loss carryover to the year 1966. At least from his argument and statements at the trial and on brief, this is a reasonable inference. Also, apparently the parties are in agreement that the 1964 operating loss, if any, should first be carried back to 1961 and then to 1962 and 1963 if there is any remaining and that the 1965 loss should first be carried back to 1962 and then to 1963. Also, there appears to be no disagreement between the parties with respect to petitioner's income in the years 1961 and 1963 to which a net operating loss is to be applied. The only difference between the parties in 1962 concerns whether petitioner's reported income should be increased by some amount of interest applicable to his savings accounts. While it is reasonable to assume from the number of savings accounts which petitioner had in 1962 that he must have received some interest, there is little evidence in the record to show the amount of such inter-

est. However, the record does show that petitioner paid $980 or at least half of that amount in connection with the loan on the Hazeltine property in 1962 and it would appear he would have been entitled to deduct this interest payment in that year had he claimed it. The fact that petitioner in 1962 claimed the $1,000 standard deduction in computing his income is not a problem since we are concerned only with petitioner's 1962 "operating income" for the purpose of determining the amount of loss carryback which would be absorbed in 1962. We have concluded in the state of the record here to consider the income as reported by petitioner in 1962 to be the proper starting point in determining the amount of the loss carryback which will be absorbed in that year. As to the year 1963, the record is even more confused. Petitioner apparently had claimed an overpayment from taxes withheld and because of an office audit had the amount of overpayment he had claimed reduced. In any event there is no showing in this record what ultimate determination was made with respect to the audit. Two of the items in that report concern items which would not affect the



computation of the amount of net operating loss carryback absorbed in the year 1963. The item that would affect this computation is the deduction for fire insurance with respect to an apartment building. This record is sufficient to show that in computing the amount of the net operating loss absorbed by carryback to 1963 this deduction should be made from petitioner's reported income. However, from the record we conclude that respondent does not contend that any change should be made in petitioner's 1963 income as reported and therefore we have no issue in this respect.

It cannot, of course, be determined whether any amount of net operating loss will remain to be carried over to 1966 until a recomputation has been made under Rule 50, but if there does exist any such remaining loss, such remaining loss would be a proper carryover to 1966. If petitioner is still contending that he should first be permitted to carry any net operating loss for 1965 over to 1966 as a "carryback" and then to carry back to the years 1961, 1962, and 1963 any remaining losses after adjusting 1966, we do not agree with his contention. Section 172(b)(1)

specifically provides, with exceptions not applicable to this taxpayer, that a net operating loss for any taxable year ending after December 31, 1957, shall be a net operating loss carryback to each of the 3 taxable years preceding the taxable year of such loss, and that the net operating loss shall be first carried to the earliest year to which it may be carried. The portion of such loss which shall be carried to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable incomes for each of the prior taxable years to which such loss may be carried.

Decision will be entered under Rule 50.